AMERICAN BAR ASSOCIATION
VOL. XXIV JOVRNAL NO. 6
June 1938

Prosecution Policy Under the Sherman Act

THURMAN W. ARNOLD

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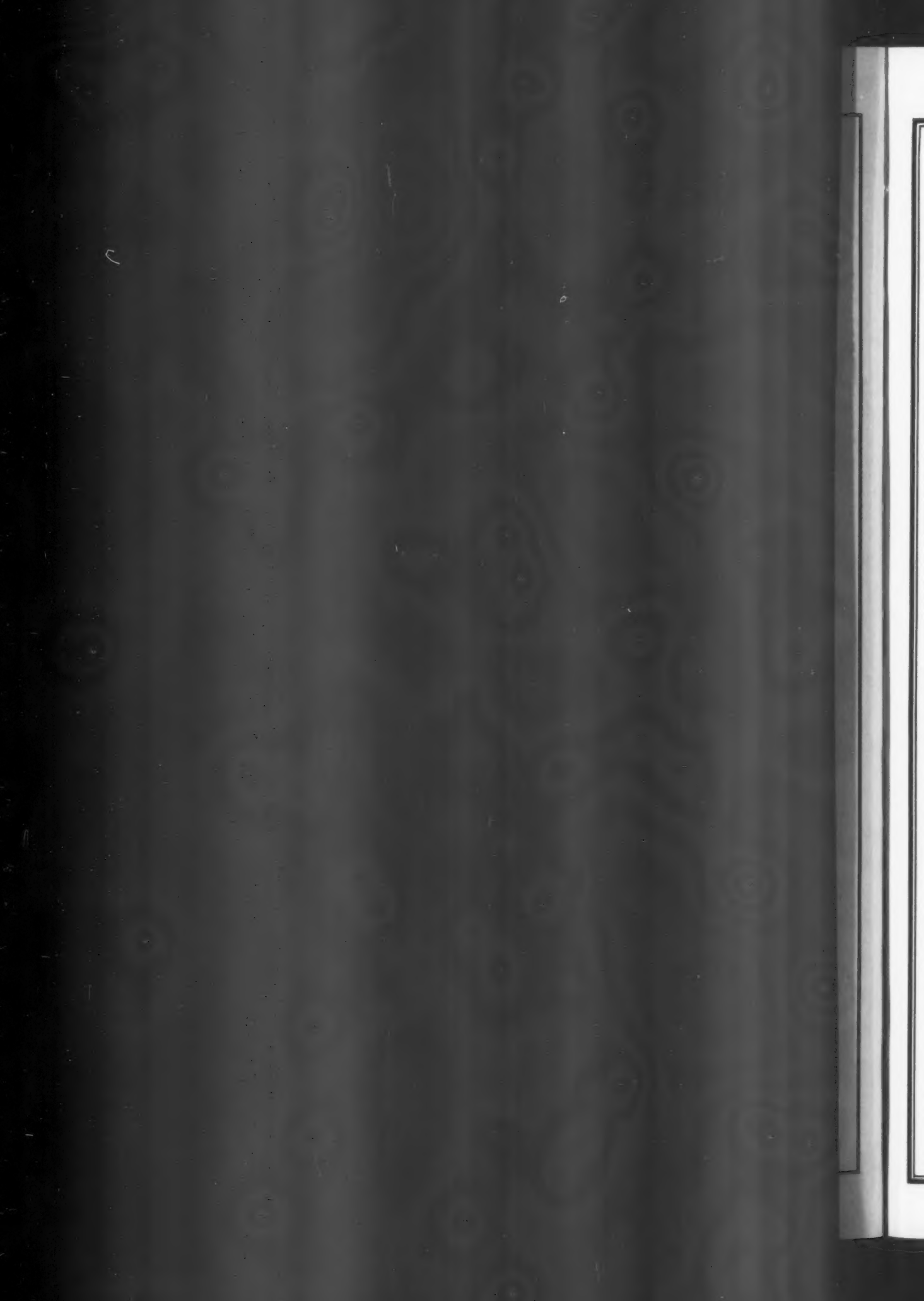

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JUNE 1938 JOVRNAL VOL. XXIV No. 6

CURRENT EVENTS

State Delegates Nominate Officers for 1938-39—Board of Governors Holds Meeting

IN accordance with the provisions of the Constitution, the State Delegates met at Washington, on May 11, to act as a nominating body for officers of the Association. There was in attendance 47 out of the 51 state delegates. At the conclusion of the balloting it was announced that Frank J. Hogan, of Washington, D. C., had been nominated for President; Thomas B. Gay, of Richmond, Va., for Chairman of the House of Delegates; George L. Buist, of Charleston, S. C., for member of the Board of Governors for the Fourth Circuit; Henry S. Ballard of Columbus, O., for member of the Board of Governors for the Sixth Circuit to fill the vacancy caused by the recent death of Hon. Newton D. Baker; Carl B. Rix of Milwaukee, member of the Board of Governors for the Seventh Circuit; Thomas J. Guthrie, of Des Moines, Member of the Board of Governors for the Eighth Circuit; Harry J. Knight, of Sunbury, Pa., Secretary; John H. Voorhees, Sioux Falls, S. D., Treasurer. The two last mentioned were renominated.

The Board of Governors held its usual May meeting in Washington on May 9-13 and transacted the customary routine business. President Vanderbilt and all the members of the Board, except Mr. Fenton, who was prevented from attending by illness, were present.

Reports of Sections and Committees and plans for the coming annual meeting were major items on the agenda. The reports indicated that the work of the Sections and Committees this year has been characterized by an unusual degree of effectiveness and cooperation. That of the Section of Judicial Administration deserves special mention and marks a definite milestone in the Association's movement for improvement in the administration of justice.

In addition to the general report of the Section, prepared and submitted by its Chairman, Judge John J. Parker, seven committee reports cover the following subjects: Administrative Agencies and Tribunals, Judicial Administration, Simplification and Improvement of Appellate Practice, Pre-Trial Procedure, Suggested Improvements in the Law of Evidence, Trial by Jury including Methods of Selection of Juries and Trial Practice. Approval was given to the printing of these reports so that they may be made available to every member of the Association.

The general subject of public relations was discussed and, in this connection, approval was given to the work now being carried on by the Committee on American Citizenship and The Junior Bar Conference. The activities of these groups are reported in the May issue of the JOURNAL.

The Committee on Administrative Law, headed by Dean Roscoe Pound, of Harvard Law School, submitted a draft of a proposed act to provide for the more expeditious settlement of disputes with the United States. Salient features of the Bill are provisions for notice and hearing upon proposed administrative rules and regulations designed to implement statutes of the United States, provision for obtaining what amounts to a declaratory judgment as to the validity of such proposed rules and regulations and provision for administrative and judicial reviews of the decisions of an administrative agency. Report of this committee and consideration of the proposed act are important matters on the calendar of the annual meeting.

Approval was given to arrangements for a series of forum meetings, immediately prior to the Annual Meeting, on the new Federal rules of civil procedure, with particular attention to practical questions involved. Conduct of a Law Institute at the Annual Meeting, under the supervision of the Section of Legal Education, was also approved. Brief articles relating to these features of the meeting will be found elsewhere in this issue. The proposal to create a Section on Commercial Law, was approved, in principle. Under the Constitution, new Sections may be created by the House of Delegates, upon recommendation of the Board of Governors. The matter, therefore, now rests with the House for decision.

Completion of plans for the publication of a daily newspaper at the annual meeting was reported to the Board. It is contemplated that the sessions of the various Sections, as well as the sessions of the Assembly and House of Delegates, will be reported. Members in attendance will thus be provided with much information not found in the Advance Program or in the Annual Report.

The Councils of the Section of Legal Education and Admissions to the Bar, the Section of International and Comparative Law, the Section of Insurance Law and the Junior Bar Conference also held meetings at this time at Washington, most of them for the purpose of perfecting final details for the program of the Cleveland meeting. The Committee on Professional Ethics and Grievances held somewhat extended hearings, and so did the Special Committee on Law Lists. The Committee on Unauthorized Practice of the Law also held a meeting.

Approved Law Lists to Be Published in June

ANNOUNCEMENT that the Law Lists approved by the Association's Special Committee on Law Lists will be published soon after its meeting in Chicago on June 11, is contained in the following statement issued by the Committee at the conclusion of the recent meeting at Washington, D. C.

"Pursuant to notice heretofore published, meeting of the American Bar Association's Special Committee on Law Lists was held at the Hotel Mayflower, Washington, D. C., on May 10 and 11.

"Numerous matters were up for consideration. The sessions were open to all interested in the administration of the Rules and Standards and many lawyers out of sheer interest in the subject, as well as representatives of law lists

and bar associations, were in attendance. A fine spirit of intelligent cooperation prevailed and the sessions were altogether profitable.

"The Committee's next meeting will be held at the Palmer House, Chicago, Illinois on June 11, 1938. Announcement of the law lists approved will be published soon thereafter along with committee rulings and information pertinent thereto. In the meanwhile necessary information may be had and conferences arranged through Martin J. Teigan, Secretary of Special Committee on Law Lists, 209 S. La Salle Street, Chicago.

Pacific Northwest Wins Again

ANNOUNCEMENT of the 1938 winner in the Ross Essay competition founded by a bequest in the will of Judge Erskine M. Ross of California was made by the Board of Governors during its recent meeting at Washington. For the second year in succession, the prize has been won by a lawyer in the Pacific Northwest. The 1938 topic for the competition was "The Extent to Which Fact-Finding Boards Should Be Bound by Rules of Evidence," and this year's prize of $3,000 has been awarded to Albert Edgar Stephan, who is identified with the Interstate Commerce Commission's Bureau of Motor Carriers, with offices in Portland Oregon. The presentation of the prize and the reading of the winning essay will take place at the Cleveland meeting, after which the essay will be published in the JOURNAL.

In 1937, the winner of the contest was Elwood Hutcheson, a lawyer practicing at Yakima in the State of Washington. Thus in successive years this notable award has gone to a lawyer in the Ninth federal circuit, of whose Court of Appeals the the donor of the prize was long a revered member. This year's Committee of award consisted of Dean H. C. Horack, of the Duke University Law School, Durham, North Carolina; Judge Jesse C. Adkins, of the United States District Court for the District of Columbia; and Ex-Judge William L. Ransom, former President of the American Bar Association.

The Ross Essay prize attracts the competition of many of the leading deans and professors of law schools, as well as well-known practicing lawyers throughout the United States. Twenty-nine States and the District of Columbia were represented in this year's contest, in which sixty-eight essays were submitted. The States represented were Alabama, Arizona, California, Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin, and the District of Columbia. The States from which there were two or more competitors were Arizona, California, Colorado, Connecticut, Illinois, Kansas, Massachusetts, Nebraska, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, and the District of Columbia. The thoroughly representative character of the competition, both geographically and among the different kinds of activity in the work of the profession of law, has been definitely established and is in keeping with the broadly representative character of the Association whose members are eligible for the competition. The subject for the 1939 competition will be selected and announced next month at the Cleveland meeting of the Association.

ALBERT E. STEPHAN
Winner of Ross Essay Award, 1938

In view of the public importance of the vital subjects which are usually selected for the Ross Essay competitions, it may be regrettable that only the winning contribution is usually published. More than a few of America's first class minds in the field of law submitted essays in this competition; and nearly a dozen of the essays are said to have substantial merit as constructive and useful discussions of a topic which is of prime importance and may be still in its formative stages. The considerable volume of enlightened and well-reasoned thinking which has gone into these essays is hardly given its full public fruition through the publication of one essay and the return of the others to their authors. In any event, the Ross Essay competition has achieved a quality and significance which justify and fulfill the high purposes of the distinguished jurist who was its founder.

Following is a brief biographical sketch of the winner of the 1938 competition:

Albert E. Stephan of Portland, Oregon, born June 24, 1905, Washington, D. C., son of Mr. and Mrs. D. E. Stephan. Married Katharine Hart, daughter of Mr. and Mrs. Charles A. Hart of Portland, Oregon, December 30, 1936. One daughter, Julia.

A. B. (Wesleyan University, Connecticut) 1926. LL.B. (Harvard Law School) 1929.

Examiner, Interstate Commerce Commission, 1929-1933; Attorney, United States Senate Committee on Interstate Commerce, 1933-1934; Assistant Counsel, Federal Communications Commission, 1934-1936; Regional Examiner, Interstate Commerce Commission, Portland, Oregon, 1936—

Admitted to bar of Massachusetts, District of Columbia, and U. S. Supreme Court; member American Bar Association, Federal Bar Association, University Club (Portland, Oregon), Alpha Delta Phi Fraternity, Delta Sigma Rho forensic fraternity, Gamma Eta Gamma legal fraternity.

Joint Conference on Legal Education and Admissions Organized

A MEETING was held at Des Moines, Iowa, Saturday, May 21, at the call of Hon. Burt J. Thompson, of Forest City, President of the Iowa Bar Association, who presided at the meeting, attended by Mr. Thompson, representing the Bar; Attorney General John H. Mitchell, chairman, and the members of the Iowa Board of Bar Examiners; Dean Rutledge, of the University of Iowa Law School; Acting Dean Tolleson, of Drake University

Left
A. Warner Parker
Oct. 29, 1938

Law School; and A. G. C. Bierer, Jr., Chairman of the National Conference of Bar Examiners.

The purpose was the organization of a Joint Conference on Legal Education and Admissions, in line with the present plan for the organization of such Conferences in each State, sponsored by the Section of Legal Education, the Association of American Law Schools, and the National Conference of Bar Examiners, for the purpose of correlating the efforts and objectives of bar admission authorities and the law schools.

Extensive discussion of general and specific problems pertinent to the Iowa situation was held, resulting in the formation of the Conference on a permanent basis and a resolution to prepare and present to the forthcoming June meeting of the Iowa Bar Association, to the Legislature and to the Supreme Court a program of specific recommendations for the improvement of standards and bar admission methods in Iowa.

Citizenship Program to Culminate in Nation-Wide Broadcast

ON June 21st a radio broadcast of one hour's duration over a nation-wide hookup will mark the celebration of the 150th anniversary of the ratification of the United States Constitution by the New Hampshire Legislature. New Hampshire was the ninth State to ratify, doing so on June 21st, 1788, and the Constitution, according to its provisions, thereby became the supreme law of the land and the form of government for all.

The broadcast is sponsored by the Association's American Citizenship Committee and the Junior Bar Conference, and will serve as the culmination of the American Citizenship program for the year. The program will be carried by the blue network of stations of the National Broadcasting Company from eight to nine p. m. eastern daylight saving time. Three quarters of the hour will be devoted to a dramatic sketch, "The More Perfect Union," written especially for the occasion by members of the broadcasting company staff, and it will portray in original style and with strict historical accuracy the gathering of the delegates to the Constitutional Convention in Philadelphia, the arrival of General George Washington, the dinner given by Benjamin Franklin to the leading delegates, and the session and debates of the Convention resulting in the final agreement and adoption of the instrument. Thereafter will follow brief scenes showing the ratification by the first eight states and, finally, by the all important one, New Hampshire.

At the conclusion of the dramatic program President Arthur T. Vanderbilt will deliver a short address on "The Present day Significance as a Ratification of the Federal Constitution." He will speak from Exeter, New Hampshire, the place where the New Hampshire Legislature convened and where ratification took place exactly 150 years ago. This historic old town is celebrating at the same time the tercentenary of its founding. The portion of the program from Exeter is being made possible through the cooperation of the New Hampshire State Bar Association.

Washington Letter

New Civil Procedure Rules Persuasive in Advance of Effective Date

THE United States Court of Appeals for the District of Columbia relied, in part, on the proposed new Rules of Civil Procedure in sustaining a former position which it had taken, although it recognized that a different rule was maintained in some circuits.

The court had ruled in 1917 that, under its then new equity rules, a motion to dismiss a bill for lack of jurisdiction of the person and of the subject matter will not constitute a general appearance, but that the court will first dispose of the question of jurisdiction of the person. Ryan v. McAdoo, 46 App. D. C. 117.

The District Court of the United States for the District of Columbia had held in the recent case, that a defendant who attempted to appear specially had failed to do so. In his motion to dismiss he had included, among the grounds therefor, "other matters appearing on the face of the bill." The trial court held, further, that by invoking the court's judgment as to the bill's sufficiency he had waived the objection to jurisdiction over his person which otherwise was suggested by his alleged special appearance and that he thereby had entered a general appearance.

In reversing the lower court, the Court of Appeals for the District of Columbia said, in part: "It may not be out of place to call attention to the new rules of civil procedure applicable alike to this Circuit and the other Federal Circuits. It is not unlikely that they will come into effect within a few months and if we should now abandon our former ruling and adopt the other view, we should be compelled after the effective date of the new rules to revert to Ryan v. McAdoo. For his reason, as well as because we think the rule which has been in force is a good one, we adhere to our former construction." Herzog v. Hubard, et al., No. 7034.

The Practice of Law

What does and what does not constitute practicing law may be more thoroughly defined as a result of the conference recently held in Washington between the American Bar Association's Committee on Unauthorized Practice of the Law, of which Mr. Stanley B. Houck, of Minneapolis, Minnesota, is Chairman, and representatives of the American Mutual Alliance, an association of mutual insurance men who were represented at the conference by Mr. A. B. Kelly.

The Bar Committee, recognizing its lack of authority to bind the Association, indicated its intention of going fully into the matter in preparation for making its report to the Cleveland convention in July. This conference and the problems before it grew out of attacks which several groups of lawyers have made on what apparently has been the practice of law by persons not lawyers. Perhaps the outstanding case was that at Columbia, Missouri, where the State Circuit Court dismissed a suit for a declaratory judgment by six mutual insurance companies and issued an injunction restraining the companies and their employees who were not lawyers from performing six varieties of acts in which legal knowledge and the employment of legal judgment were involved. It is understood that the companies are filing a bill of exceptions and appealing the case to the Supreme Court of Missouri.

Director of Tax Research Appointed

Effective June 1st, Roy Blough, Ph. D., has been appointed Director of Tax Research of the Treasury Department. Mr. Blough comes from the University of Cincinnati, where he has been Associate Professor of Economics in the Graduate School of Public Administration. Prior to that he was Chief Statistician of the Wisconsin State Tax Commission and has contributed articles on tax problems to some of the technical journals. He was associate director of a tax study recently made by the Twentieth Century Fund and co-author of the resulting book entitled, "Facing the Tax Problem." He is Chairman of the Committee on Social Security Leg-

(*Continued on page* 495)

PROSECUTION POLICY UNDER THE SHERMAN ACT

Need for a Consistent and Understandable Prosecution Policy Publicly Stated and Available to Business Men Has Never Been Greater Than It Is Today—Announcement of General Purposes of Department of Justice Recently Made at Suggestion of Attorney General Cummings—Plan to Make Vigorous Enforcement Fairer and More Equitable by Public Statements of the Grounds for Prosecutions in Particular Cases—Obvious Advantages of This Course—Official Announcement of Form and Content of Such Statements—Concurrent Use of Civil and Criminal Proceedings, etc.

By Thurman W. Arnold
Assistant Attorney General of the United States

In view of the large interests involved, it is important that the prosecution policy of the Department of Justice under the Antitrust Laws be stated as explicitly as possible. This does not mean that it can be reduced to a rule of thumb. The rule of reason, which has long been considered essential to the administration of the Sherman Act makes sharply defined standards impossible. There are three questions continually arising in the administration of the Antitrust Laws which compel the exercise of judgment, first on the part of the prosecutor, and second on the part of the court. They may be stated as follows:

1. Does the particular combination lead to more efficient mass production and lower prices, or is it a combination which destroys competition with industrial units which are capable of efficient mass production while operating separately?

2. Is the particular combination one which is necessary to preserve orderly marketing conditions without which competitors can not do business, or does it utilize the principle of orderly market merely as a pretense for the suppression of competition?

3. What is the proper procedure to be used in the various types of cases?

Businessmen can not find the answer to these questions in any set of definitions, because the many situations in which the Antitrust Laws are invoked have become so widely diverse. What is reasonable in one industry may not be reasonable in another. Therefore, prosecution policy can become definite only when it is stated with reference to concrete conditions in particular industries. If businessmen are to have a guide as to the attitude of the Department of Justice they can obtain it only through a series of statements which apply to particular cases and thus give standards which those in similar situations may follow.

It has not been customary for the Department to make public statements giving the reasons for its prosecution policy in particular cases or the reasons why the particular procedure was selected. In the past it has been assumed that the prosecution policy could be spelled out by intensive study of the decisions. Such an assumption is today recognized as one creating more confusion than enlightenment. It has caused puzzled businessmen to seek promises of immunity from the Department on plans for business expansion or combination which they presented to and discussed with the Antitrust Division. The practice became discredited because too often an apparently reasonable plan involving combinations of industrial units was the opening move in the chess game which led to the building up of monopoly control. In other instances, even though the parties acted in complete good faith in seeking immunity from the Department, experience proved that the plan did not work out in operation as the parties contemplated, and the total effects of its operation were in the Department's view illegal under the antitrust laws. In such a situation the Department found itself embarrassed by the promise of immunity.

There followed the custom of business men to hand in memoranda to the Department which disclosed their plans. The Department took the position that it could give no advice whatever on such memoranda but the businessmen were entitled to guess that if no prosecution was threatened their plan had not met with disfavor. No immunity was promised but the absence of action on the part of the Department over long periods of time gave rise to the atmosphere of acquiescence which made future prosecutions appear inequitable. Often that atmosphere of acquiescence was the result of the inability of the Department because of limitation of funds and personnel to investigate the possible consequence of the proposed combination. In any event, it offered a far from satisfactory solution of the problem of giving businessmen advice as to how they could proceed and at the same time it hampered the Department in future action.

The need for a consistent and understandable prosecution policy publicly stated and available to businessmen has never been greater than it is today. In spite of a governmental religion dedicated to the economic independence of individuals the domination of the market by small groups and the concentration of wealth and power in a few hands has constantly been increasing. Industrial prices fixed by monopoly control are different from taxes only in the fact that such prices are levied without public responsibility and their proceeds are used for private and not for public purposes. Such prices are taxes levied on the rich and poor alike. And not only do they tax income but they tend to destroy the sources of the incomes themselves because the great mass of our population sells its goods and labor in a competitive market and buys its necessities in a controlled market. Intelligent men of all

political parties agree that unless competition can be maintained government regulation and interference with business is inevitable. This problem must be faced when it arises. Yet it is precisely because the Department of Justice does not wish those areas of necessary interference to increase, and because it wants to keep the government out of business that it is advocating the vigorous and consistent enforcement of the Antitrust Laws.

The Antitrust Laws are today the only officially recognized instruments to restore or maintain competitive conditions. They are admittedly imperfect tools but they are the only tools at hand. The Department of Justice can not amend these laws. Its obvious duty is that of vigorous enforcement. But vigorous enforcement if it is also to be fair enforcement should be accompanied by as definite and widespread information on prosecution policy as it is possible to give.

Recognizing the need for a publicly stated prosecution policy, at the suggestion of Attorney General Cummings I recently made an announcement before the Trade & Commerce Bar Association of the City of New York, outlining in general the present purposes and policy of the Department. The first question of policy discussed was whether the Department ought not to exercise its judgment and discretion in slowing up antitrust prosecution during the present period of depression in order to give business the confidence to expand. The legalistic answer to that question is easy. It is found in our national belief in the efficacy of law enforcement as an end in itself.

A better answer is found in the examination of economic reality. From a long range point of view the vigorous enforcement of Antitrust Laws is never more important than during periods of economic recession. Such periods give the larger and stronger firms new incentives and easier opportunities for extending their control over a narrow market. It is during these periods that the smaller firms, weakened by declining sales and profits, are most susceptible to destruction as the result of practices denounced by the Antitrust Laws. In other words, times of financial failure are the very times when persons with a thirst for power pick up the broken pieces of competing organizations and put them together. The clock can not be turned back when prosperity returns again. It is extremely difficult to recreate competitive organizations which have been destroyed, because effective organizations are the result of habits and discipline and team work. Even the best baseball team after being disbanded for a year can not suddenly come together and win games. Organizations take time to build. They do not become efficient overnight. When they collapse it is anybody's guess whether they can be built up again. Therefore, a time of business recession is not a proper time to acquiesce in the building of monopoly control.

We recognize that competition may be destroyed not only by active suppression; it may also be destroyed by the over-competition resulting from a temporary over-supply and a catastrophic price decline. Orderly markets are necessary in order to maintain the solvency of competitors. We must recognize that we are living in a world of competing organizations rather than competing individuals; that modern methods make mass production more efficient up to a certain point, and that an orderly market is required for the efficient distribution of goods. However, this principle must not be turned into an excuse in times of depression to broaden the principles underlying the maintenance of orderly markets until they become a cloak for industrial empire building.

So much for the announcement of general policy which I made at the suggestion of Attorney General Cummings. The second announcement of policy made at the same time concerned the problem we have been discussing—that of making vigorous enforcement fairer and more equitable by public statements of the grounds for the prosecution of the particular cases. In my announcement before the Trade & Commerce Bar Association of the City of New York, I pointed out that the complaint itself directed at the narrow issues of the case in which formal legal requirements and general principles had to be emphasized had not been adequate to enable businessmen to determine the policy of the Department. I stated that there was no reason why information as to the policy of the Department of Justice should not be available to businessmen so long as it did not involve the granting of individual immunity. The advantage to both sides is obvious. So far as the government is concerned, public announcements of prosecution policy may avoid the atmosphere of acquiescence in cases where limitations of personnel make it impossible to prosecute. So far as business is concerned, such statements can localize the Department's interpretation of the law to particular industries and thus make prediction easier. In conformity with that announcement, Attorney General Cummings on May 18, 1938, issued a general statement of the form and content of the public statements which will be made in the future which reads as follows:

DEPARTMENT OF JUSTICE

May 18, 1938

The Department of Justice recently announced a policy under which there would be issued a series of public statements throwing light on the prosecution policy with respect to antitrust laws. The necessity for making such public statements with respect to antitrust prosecutions arises from the fact that they present a problem different from the enforcement of other criminal statutes. In antitrust cases the rule of reason necessarily requires the exercise of judgment on the part of the prosecuting arm in order to give the general principles of the antitrust laws an equitable and economic application to unlike cases and dissimilar industrial situations. A guide to businessmen as to prosecution policy should be furnished by the Department wherever possible.

There is set forth below an outline of the general form which future statements of this character will take:

1. *Form of Statements.* The statements will be issued in the form of announcements signed by the Assistant Attorney General in charge of the Antitrust Division, and approved by the Attorney General.

2. *Purpose of Statement.* The aim of these statements in connection with any particular proceeding or investigation is to serve (1) as a guide to businessmen who seek information on the probable action of this Department in similar circumstances; (2) to aid the Department itself in formulating a consistent policy of antitrust law enforcement; (3) to serve as a warning to those engaged in similar illegal practices; and (4) to call the attention of the Congress to the interpretation and application of antitrust laws by the Attorney

General, as they may have a bearing upon contemplated legislation.

3. *Contents of Statements.* These statements on prosecution policy will not discuss the guilt or innocence of particular defendants; they will not interfere with the presumption of innocence which defendants have in a criminal case or the advantage of the burden of proof which they enjoy in a civil case. They will be confined to the reasons for departmental action. It may be assumed as a matter of course that the Department would not take action unless it had in its possession evidence which in its judgment warranted it in proceeding. Under such circumstances, the Department is under a public duty to present such evidence to an impartial judicial tribunal.

In general, the statements will cover (1) the conditions which the Department believes to exist in the particular industry which create monopolistic control or restraint of trade; (2) the reason why the particular procedure was followed, whether a civil suit, consent decree, criminal prosecution, acceptance of pleas of *nolo contendere,* or dismissal of the proceeding; and (3) the economic results which are to be expected from its action in the particular case.

This statement explains itself and needs no comment. Following this announcement of general policy by Attorney General Cummings, only one statement with reference to a particular case has been made at this time though others are in preparation and may have appeared by the time this article is published. The general policy of this statement concerns only the concurrent use of civil and criminal proceedings and reads as follows:

DEPARTMENT OF JUSTICE

May 18, 1938.

The following announcement, and statement of policy, concerning the Automobile Finance investigation was issued today by the Department of Justice:

The Department of Justice proposes to present evidence before a grand jury in South Bend, Indiana, with reference to violations of the antitrust laws by Ford Motor Company, Chrysler Corporation and General Motors Company and three finance companies associated with them. The evidence which it is proposed to present will be substantially the same as that presented to a grand jury in Milwaukee, Wisconsin, prior to its discharge by Judge Geiger last winter.

At the time of the original presentation, the Department was of the opinion, and is now of the opinion, that its investigation has disclosed evidence of certain violations of the criminal provisions of the antitrust law by these automobile manufacturers and their associated finance companies which warranted submission to a grand jury.

It is the announced policy of the Department of Justice to issue public statements in order to clarify its prosecution policy with respect to antitrust laws. Such statements will be made in connection with particular cases, to the ends that it shall be a guide to businessmen and the public in similar situations. In this case the only policy which needs statement and clarification concerns the concurrent use of civil and criminal remedies granted by the antitrust laws. Such clarification is important here because this policy was questioned by the court in the original grand jury presentation at Milwaukee, Wisconsin. As a result of this, there has been some misunderstanding of the policy in spite of the fact that it was publicly stated before committees of both the Senate and the House. Therefore, in order to clear up this misunderstanding with respect to the concurrent use of civil and criminal procedures, it is thought advisable to restate publicly the course which the Department intends to pursue in this and future cases.

Our policy which has been stated to the representatives of the companies involved in this case may be summarized as follows:

1. The Department will not compromise a criminal case upon an agreement by the defendants to refrain in the future from the violations with which they are charged. We cannot accept the responsibility of condoning violations of the antitrust laws because of a promise to reform.

2. The commencement of a grand jury proceeding or a criminal prosecution does not do away with the presumption of innocence which surrounds any defendant. It only means that this Department is in possession of evidence of violation of law which it deems so compelling that it cannot accept the responsibility of ignoring it and must therefore present it to an impartial judicial tribunal. While the Department must exercise a preliminary judgment as to the weight of the evidence, the ultimate responsibility for the weighing of that evidence is necessarily on the grand jury and petit jury and the court.

3. In using civil and criminal proceedings concurrently, (a practice which has been approved by the Supreme Court in the case of Standard Sanitary Manufacturing Co. v. United States, 226 U. S. 20) it is not the purpose of the Department to coerce or compel the prospective defendants to consent to a civil settlement on threat of criminal prosecution. The sole purpose of the criminal proceeding is to present to an impartial tribunal evidence which leads the Department to believe that the antitrust laws have been violated. At the same time it has never been the policy of the Department to bar its doors at any stage of the proceeding against businessmen who may desire to propose a practical solution which is of major and immediate benefit to the industry, to competitors and to the public and which goes beyond any results which may be expected in a criminal proceeding.

Such a solution must be voluntary. While we do not invite the submission of such proposals, it will be our policy in all cases to examine and consider any which may be made. They must offer in addition to a prohibition of the violations of the antitrust laws with which the prospective defendants are charged, substantial public benefits connected with the policy of maintaining free competition in an orderly market which could not be obtained by the criminal prosecution.

If proposals of this character are submitted to the Department, it conceives that its duty is to present them to the court before whom the proceeding is pending in order that he may determine whether a *nolle prosse* is justified in the public interest.

Where the proceeding is still pending before a grand jury which has not yet returned indictments, this method is not strictly a *nolle prosse.* However, the analogy of recommendation for *nolle prosse* will be followed in cases where consent decrees have been submitted to the Department before indictment. The judge in such cases will be informed of the submission of proposals which the Department believes to be in the public interest in order that, if he deems that course

desirable, they may be presented to the grand jury for consideration in connection with the evidence.

THURMAN ARNOLD,
Assistant Attorney General.

Approved:
HOMER CUMMINGS,
ATTORNEY GENERAL.

This announcement states a policy essential to antitrust prosecution under present procedure. Whenever a criminal prosecution is commenced, even though it be in the form of a grand jury investigation where no particular defendants are named, the leaders of the industry usually come to the Antitrust Division with various kinds of proposals. To deny them access, and to close the door against persons with the bona fide intention to clear up conditions in the industry which lead to the violation of Antitrust Laws under great pressure is obviously not a sensible method of conducting the Antitrust Division. Nor would it be acceptable to businessmen themselves. Violations of the Antitrust Laws in general are not like burglary or grand larceny. Jail sentences are conspicuously rare. They may be more accurately compared to prosecution for reckless driving, an offense which is often committed by respectable people under the pressure of meeting engagements. Obviously sympathetic considerations can play no part in determining whether reckless driving should be prosecuted. If they did play such a part, the traffic problems would immediately get out of hand. Nevertheless, in dealing with antitrust misdemeanors the Department of Justice is not in the same situation as if it were dealing with burglars or thieves. Therefore, to refuse to listen to proposals on the part of businessmen desiring to clear up a situation would be to neglect the most effective means for the maintenance of competitive conditions in industry.

Of course any criminal prosecution could be used as an instrument to coercion. There is no guarantee against such practices excepting good faith in the prosecuting officer. On the other hand, it is equally true that charges of coercion are easier to make against those who prosecute the Antitrust Laws than in most types of prosecution. The evidence taken in a grand jury investigation can not be disclosed. And where evidence is disclosed a trial is too complicated to be understood without laborious analysis. There is therefore no protection which the Department can have against such public charges of coercion. Commentators are free to give vent to their emotional impulses without fear of successful correction. It is for this reason that it has become important to make the above announcement as to the precise limitations which the Department imposes upon itself in using civil and criminal procedure concurrently.

Where so much suspicion of coercion can be raised by irresponsible persons, it is important that the Department do all in its power to make the reasons for its action public. It is certainly easier for coercion to be exercised secretly where the grounds for the *nolle prosse* of any suit are not made part of the public record.

The concurrent use of the criminal and civil procedure has the sanction of the Supreme Court of the United States. The announcement sets out every possible safeguard against unlawful or even unethical coercion. Those safeguards are: (1) The proposal must be voluntary, which means that the Department will in no instance start negotiations or suggest compromises on the basis of which prosecution would be dropped. (2) It will not compromise criminal cases on the mere promise to reform. It will accept only proposals which restore competitive conditions in a way which could not be accomplished by prosecution. (3) It will submit all such proposals to an impartial judicial tribunal and thus be guided by the judgment of the court before it takes final action. (5) Finally it will issue a public statement giving the reasons for its action.

This policy is adopted to the end that the Department will not be compelled to close its doors to the voluntary proposals of businessmen who are seeking to restore competitive conditions, even though some officials of their companies may have violated the law.

NOMINATIONS FOR OFFICERS AND MEMBERS OF THE BOARD OF GOVERNORS OF THE AMERICAN BAR ASSOCIATION

In accordance with Article VIII, Section 2, of the Constitution, the Secretary of the American Bar Association certifies for publication in the AMERICAN BAR ASSOCIATION JOURNAL that at a meeting of the State Delegates, duly called and held at Washington, D. C., on May 11, 1938, at ten o'clock A. M., the following named offices, to be voted upon by the House of Delegates at the annual convention to be held the week of July 25 at Cleveland, Ohio:

For President: Frank J. Hogan, District of Columbia.

For Chairman of the House of Delegates: Thomas B. Gay, Virginia.

For Secretary: Harry S. Knight, Pennsylvania.

For Treasurer: John H. Voorhees, South Dakota.

For Members of the Board of Governors:
Fourth Circuit: George L. Buist, South Carolina.
Sixth Circuit: Henry S. Ballard, Ohio.
Seventh Circuit: Carl B. Rix, Wisconsin.
Eighth Circuit: Thomas J. Guthrie, Iowa.

HARRY S. KNIGHT,
Secretary, American Bar Association, acting as Secretary of State Delegates.

Signed Articles

As one object of the AMERICAN BAR ASSOCIATION JOURNAL is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this JOURNAL assume no responsibility for the opinions in signed articles, except to the extent of expressing the view by the fact of publication, that the subject treated is one which merits attention.

WHAT HAS HAPPENED TO FEDERAL JURISPRUDENCE?

Erie Railroad Company vs. Tompkins Is An Epochal Decision Raising, by Its Sweeping Language, Many Unanswered Questions Which Will Probably Trouble the Federal Trial Courts for Years to Come—Must the Principles of Equity Jurisprudence Administered in the Federal Courts Henceforth Be the Principles, if Any, of Equity Jurisprudence of the Several States?—Criticism of Majority Opinion's Holding that Course Heretofore Pursued by Federal Courts Has Been Unconstitutional—A Question of Statutory Construction Only—Mr. Warren's New Light to Be Received with Caution—Ruhlin vs. New York Life Insurance Co., etc.

By Albert J. Schweppe
Member of the Seattle, Washington, Bar

ON APRIL 25, 1938, the Supreme Court of the United States reversed the course of one hundred and fifty years of judicial thinking as to the source of the "rules of decision" to be applied in the federal courts, sitting at law or in equity.

Until the decision on that day in *Erie Railroad Company v. Tompkins*, it had been confidently supposed, and often adjudged, that, under the Constitution (which merely confers jurisdiction at law and in equity in general terms—Article III, section 2; Seventh Amendment; Eleventh Amendment—without stipulating the common law or equity rules of the several states), the "rules of decision" in causes at common law was the common law of England, as developed in the federal courts, and not the common law of the several states, and in equity causes the principles of equity jurisprudence of the English High Court of Chancery at the time of the adoption of the constitution, as developed in the federal courts, and not the differing conceptions of equity jurisdiction existing in the several states—subject, of course, to such limitations and conditions as Congress might establish by virtue of its oft-declared power over the jurisdiction of the federal courts. (*Lauf v. Shinner Co.*, decided February 28, 1938, 58 Sup. Ct. 578, and cases cited.)

In *Erie Railroad Company v. Tompkins*, the Supreme Court of the United States, on April 25, 1938, disapproved the doctrine of *Swift v. Tyson*, 16 Pet. 1-8 (1842), and, contrary to the construction of Section 34 of the Judiciary Act of 1789, followed for 96 years in many cases, the court holds that the state "laws" which are "rules of decision" in trials at common law, include not only state statutes but the common law decisions of the states.

But not only does the Supreme Court change the previously settled construction of Section 34 of the Judiciary Act of 1789, a settled construction going back much further than *Swift v. Tyson* (1842); but the court holds that the course pursued by the federal courts in laying down general rules of the common law in the exercise of their own independent judgment, in controversies triable in the federal courts under applicable acts of Congress, was an unconstitutional course and "invaded rights which in our opinion are reserved by the Constitution to the several states."

The court, without referring to any constitutional provision, says:

"If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so."

The court further says:

"Except in matters governed by the Federal Constitution or by the Acts of Congress, the law to be applied in *any* case is the law of the State." (Italics ours).

The decision was written by Mr. Justice Brandeis and was adopted by a vote of six to two, Mr. Justice Cardozo taking no part. Mr. Justice Butler and Mr. Justice McReynolds dissented; and Mr. Justice Reed, while concurring in the construction now placed by the majority of the court on Section 34 of the Judiciary Act, dissented from the statement in the majority opinion that there was anything unconstitutional in the course previously pursued by the federal courts.

This epochal decision, which overturns the rule of many supreme court decisions and of thousands of decisions in the lower federal courts, and which by its sweeping language raises many unanswered questions that will trouble the federal trial courts probably for years to come, deserves more than mere passing comment, because of the tremendous consequences which seem to be inherent in the reasoning of the decision.

1. If, as suggested by the majority decision, there is any constitutional obligation of the federal courts to follow state decisions, instead of merely a congressional mandate, then the consequences of the decision are indeed appalling. The decision unsettles the entire structure on which the federal judicial system rests.

If it is true, as said by the majority, "that except in matters governed by the Federal Constitution or by the Acts of Congress, the law to be applied in *any* case is the law of the State," and if this is a right which is "reserved by the Constitution to the several states," then how about the principles of equity jurisprudence administered in the federal courts? Must they henceforth also be the principles, if any, of equity jurisprudence of the several states?

In this connection it must be borne in mind that the grant of judicial power in the Constitution as to

law and equity is in the same terms, without distinction, and without there being any suggestion in the Constitution that the general jurisdiction in law and equity is conferred according to the differing conception of law and equity existing in the several states, rather than in common law cases according to the common law of England as it existed at the adoption of the Constitution and as since developed by the federal courts, or in equity cases according to the practice of equity jurisprudence administered in the English courts of chancery as it existed at the adoption of the Constitution and as since developed by the federal courts.

From the earliest times right down to the present date the Supreme Court has held that the principles of equity jurisprudence applied in the federal courts are not the rules of equity of the several states, but the rules of the English courts of chancery at the time of the separation of the two countries, and that state legislation cannot change or restrict the principles of equity jurisprudence administered by the federal courts. *Pusey and Jones v. Hanssen*, 261 U. S. 491, 497 (Mr. Justice Brandeis); *Matthews v. Rodgers*, 284 U. S. 521, 528-529,—opinion by Mr. Justice Stone; *Gordon v. Washington*, 295 U. S. 30, citing Robinson v. Campbell, 3 Wheat. 212 (1818),—opinion by Mr. Justice Stone; *Robinson v. Campbell*, 3 Wheat. 212, 221-223 (1818); *U. S. v. Howland*, 4 Wheat. 108, 115 (1819) (Marshall, C. J.); *Pennsylvania v. Bridge Company*, 13 How. 518, 563-4 (1851); *Fenn v. Holme*, 21 How. 481-484-487.

In *Matthews v. Rodgers, supra*, 284 U. S. 521, the court said (p. 529):

". . . In any case, the section (of state law) cannot affect the jurisdiction of federal courts of equity. The equity jurisdiction conferred on inferior courts of the United States by §11 of the Judiciary Act of 1789, 1 Stat. 78, and continued by §24 of the Judicial Code, is that of the English court of chancery at the time of the separation of the two countries. *Payne v. Hook*, 7 Wall. 425, 430; *In re Sawyer*, 124 U. S. 200, 209-210."

In *Gordon v. Washington*, 295 U. S. 30, *supra*, the court said, by Mr. Justice Stone, at page 36:

". . . From the beginning, the phrase 'suits in equity' has been understood to refer to suits in which relief is sought according to the principles applied by the English court of chancery before 1789, as they have been developed in the federal courts. *Robinson v. Campbell*, 3 Wheat. 212, 221-223; *United States v. Howland*, 4 Wheat. 108, 115; *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33, 43."

In *Robinson v. Campbell, supra*, 3 Wheat. 212, 221 to 223 (1818), the court said:

". . . By the laws of the United States, the circuit courts have cognizance of all suits of a civil nature at common law and in equity, in cases which fall within the limits prescribed by those laws. By the 34th section of the Judiciary Act of 1789, it is provided, that the laws of the several States, except where the constitution, treaties, or statutes of the United States, shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. The act of May 8, s.2, 1792, confirms the modes of proceeding in suits at common law in the courts of the United States, and declares that the modes of proceeding in suits of equity shall be 'according to the principles, rules, and usages which belong to courts of equity, as contradistinguished from courts of common law,' except so far as may have been provided for by the act to establish the judicial courts of the United States. It is material to consider whether it was the intention of congress, *by these provisions*, to confine the courts of the United States in their mode of administering relief to the same remedies, and those only, with all their incidents, which existed in the courts of the respective States. In other words, whether it was their intention to give the party relief at law, where the practice of the state courts would give it, and relief in equity only, when, according to such practice, a plain, adequate, and complete remedy could not be had at law. In some States in the Union, no court of chancery exists to administer equitable relief. In some of those States, courts of law recognize and enforce in suits at law, all the equitable claims and rights which a court of equity would recognize and enforce; in others all relief is denied, and such equitable claims and rights are to be considered as mere nullities at law. A construction, therefore, that would adopt the state practice in all its extent, would at once extinguish, in such state, the exercise of equitable jurisdiction. The acts of congress have distinguished between remedies at common law and in equity, yet this construction would confound them. *The court, therefore, think, that to effectuate the purposes of the legislature, the remedies in the courts of the United States are to be, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles.*"

In *U. S. v. Howland*, 4 Wheat. 108, 115 (1819), Chief Justice Marshall, speaking for the court, said:

". . . as the courts of the Union have a chancery jurisdiction in every state, and the Judiciary Act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other states."

In *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, at 564, the court said:

"In exercising this jurisdiction, the courts of the Union are not limited by the chancery system adopted by any State, and they exercise their functions in a State where no court of chancery has been established. The usages of the high court of chancery in England, whenever the jurisdiction is exercised, govern the proceedings. This may be said to be the common law of chancery, and since the organization of the government, it has been observed.

* *

"Under this system, where relief can be given by the English chancery, similar relief may be given by the courts of the Union."

In *Fenn v. Holme, supra*, 21 How. 481, the rule of *Robinson v. Campbell*, 3 Wheat. 212, was repeated, as it has been many times since.

In *Gordon v. Hobart*, 2 Sumner, 401, 405 (1836), Mr. Justice Story said:

"But this objection is without foundation in this court; for the equity jurisdiction of this court is wholly independent of the local laws of any state; and is the same in its nature and extent in all the states; that is, it is the same in its nature and extent, as the equity jurisdiction of England, from which ours is derived, and is governed by the same principles."

As to the general principles of equity jurisprudence, then, we have dozens of solemn pronouncements that the rules of decision governing the federal courts in equity are the rules of the English court of chancery applied by the federal courts according to their own independent judgment, and that even state statutes cannot change or restrict the equitable principles so applied in federal equity suits; and yet we are told, in another breath, not only that the rules of decision in common law cases are state statutes, and now also the common law decisions of the several states, but that a pronouncement as to the existence of a similar independent judgment as to the applicable rules of decision in common law cases "invades rights which in our opinion are reserved by the Constitution to the several states."

How can this be?

If "except in matters governed by the federal Constitution or by Acts of Congress, the law to be applied

in *any* case is the law of the State," and if it is an unconstitutional invasion of the rights reserved to the several states to apply anything but state statutes and common law decisions in actions at law, then by the same token it must be an unconstitutional invasion of the rights reserved to the several states to apply anything but state statutes and decisions in suits in equity, thus unsettling the whole course of judicial decision over a century and a half, and reversing the uniform opinion that existed from the very beginning,—a uniform opinion which Marshall and Story, who for so many years together worked out and delimited the scope and function of the federal judicial system, often declared.

Of course, the view that there is any constitutional aspect to the case at all is untenable. Congress unquestionably has the power to prescribe the rules of decision for the federal courts. The grant of the Constitution is of judicial power in law and equity, without designating that it shall be according to the principles of law or equity of any state. The delegation is absolute, and Congress alone has been granted the power to regulate the jurisdiction of the federal courts. The court has held since the earliest times that by law and equity is meant common law and equity, "not according to the practice of the state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles." *Robinson v. Campbell*, 3 Wheat. 212, 221-223 (1818), a much cited case, only recently cited with approval by Mr. Justice Stone in *Gordon v. Washington, supra*, 295 U. S. 30, 36. In that case Mr. Justice Stone says (page 36):

"From the beginning, the phrase 'suits in equity' has been understood to refer to suits in which relief is sought according to the principles applied by the English court of chancery before 1789, as they have been developed in the federal courts." (Citing cases).

The Seventh Amendment to the federal Constitution provides that "in suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no future trial by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

The reexamination "according to the rules of the common law" provided in the Seventh Amendment, is not a reexamination according to the common law of some state, but according to the common law of England; and the civil "suits at common law" referred to in that amendment are suits according to the common law of England, and not according to the common law of any state.

In *Slocum v. New York Life Insurance Company*, 228 U. S. 364, 377, the court said:

"In United States v. Wonson, 1 Gall. 5, 20; 28 Fed. Cas. 745, 750, a case decided in 1812 and often cited with approval by this court, it was said by Mr. Justice Story, after quoting the words of the Amendment: 'Beyond all question, the common law here alluded to is not the common law of any individual State, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence.'"

See also *Dimick vs. Schiedt*, 293 U. S. 474, 476, 496, particularly last page cited, where Justices Stone, Brandeis, Cardozo and Chief Justice Hughes say: "The common law is not one system when it, or some part of it, is adopted by the Judiciary Act, and another if it is taken over by the Seventh Amendment."

The Eleventh Amendment to the federal Constitution provides that the judicial power of the United States shall not be construed to extend to any suit, at law or equity, against a state by the citizens of another state, or of a foreign state. The amendment contains no suggestion that the law or equity there referred to are the principles of common law and of equity as they exist in individual states. By the very nature of that amendment, which limited existing judicial power at law and in equity as to parties only, the reference could not be to the principles of law or equity of any particular state. The objection to *Chisholm v. Georgia*, 2 Dall 419, 465, 469 (1793) was not to the general application in the federal courts of common law or equitable principles as received from England, but to their particular application to a suit against a state by an individual citizen of another state. If there had been, that concept would also have been changed by the Eleventh Amendment.

Article III, section 2 of the Federal Constitution, which extends the judicial power "to all cases at law and equity," also extends it "to all cases of admiralty and maritime jurisdiction," without any distinction whatever in the character of the grant. As to the "rules of decision" in cases of admiralty and maritime jurisdiction, the Supreme Court has often said: "The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate with respect to them and other matters within the admiralty and maritime jurisdiction." Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 160; Crowell v. Benson, 285 U. S. 22; The Lottawanna, 21 Wall. 558, 574, 575 (1874); Washington v. Dawson & Co., 264 U. S. 219. In the last cited case it is said: "The grant of admiralty and maritime jurisdiction looks to uniformity; otherwise wide discretion is left to Congress." In The Lottawanna, 21 Wall. 558, 574, 575, the court said: "It (The Constitution) assumes that the meaning of the phrase 'admiralty and maritime jurisdiction' is well understood. It treats this matter as it does the cognate ones of common law and equity, when it speaks of 'cases in law and equity,' or of 'suits at common law,' without defining those terms, assuming them to be well known and understood . . . The Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country."

Thus it has been held that the principles of admiralty applicable in the federal courts are the rules of the general maritime law as adopted by the Constitution and that state statutes cannot change that law in its interstate and international relations, but that only Congress can change the general admiralty law in those relations by rules of uniform operation throughout the country; and that the principles of equity applicable in the federal courts are the principles of equity jurisprudence as applied in English Chancery at the time of the adoption of the Constitution, as they have been developed in the federal courts, and that state statutes cannot affect or restrict such federal equity jurisdiction; but we are now told, for the first time, that the common law applicable in the federal courts is not the common law of England as developed in the federal courts and of uniform operation throughout the country in all cases where jurisdiction is conferred by appropriate acts of Congress, but that there is no federal common law, that Congress cannot require uniform common law rules as developed by the federal courts on a national scale, and that there is a consti-

tutional command that the federal courts apply the varying common-law conceptions of the several states.

It seems manifest that when the Constitution referred to cases at law and equity, it referred to common law causes determinable according to the principles of the common law of England, and not according to the common law of any state, and to equity causes determinable according to the principles enunciated by the English court of chancery, and not according to the equity jurisprudence of any state—all subject, of course, to any modification that Congress might make by virtue of its powers over the jurisdiction of the federal courts. *Lauf v. Shinner Co.*, decided February 28, 1938, 58 Sup. Ct. 578, and cases cited.

If the rules in federal equity suits are "the principles applied by the English court of chancery before 1789, as they have been developed in the federal courts" (Mr. Justice Stone in *Gordon v. Washington*, 295 U. S. 30, 36), then the rules in actions at common law, where not affected by statutes, are the rules of the common law of England before 1789, as they have been developed in the federal courts. All of the cases where the point was squarely raised support this view.

Again, under the Federal Employers' Liability Act it has been held over and over again that actions cognizable under that statute are determinable according to the principles of the common law as interpreted by the federal courts, regardless of what may be local common law rules which might otherwise be relevant; and this federal common law is binding, and must be applied by the state courts when actions are brought therein falling within the class of injuries in interstate commerce within the purview of that act. *Chesapeake & Ohio R. Co. v. Kuhn*, 284 U. S. 44, 47, and cases cited; *Chesapeake & Ohio R. Co. v. Stapleton*, 279 U. S. 587; *New Orleans, etc., R. Co. v Harris*, 247 U. S. 367, 371-2.

It is held that Congress intended that the Federal statute should be applied in the light of these and other common law decisions of the federal courts prescribing a uniform rule. *Central Vermont Ry. v. White*, 238 U. S. 507, 512. Mr. Justice Holmes and Mr. Justice Brandeis have often concurred as to the applicability of this federal common law, even in actions in state courts cognizable under the federal act. (Ibid., and cases cited therein.)

Is this doctrine, or course of decision, also a supposed invasion of the rights reserved by the Constitution to the several states? But if it be conceded that Congress can make applicable to suits cognizable under the Federal Employers' Liability Act, the common law of England as interpreted by the federal courts, and not improperly referred to as the federal common law, must it not be equally conceded that under the Constitution Congress, in order to provide a uniform rule of decision in federal causes throughout the nation, can provide by statute that in the exercise of judicial power in suits at common law, the common law of England shall govern, as construed and developed by the federal courts, and not as developed in the several states? The Constitution and the Seventh Amendment have been so construed from the beginning, and no constitutional limitation in that regard has been intimated until the decision in the instant case.

Can there be anything involved here except a simple question of statutory construction, free of all constitutional implications?

With the most reverent and affectionate regard for his great genius and his memory, it is respectfully submitted that Mr. Justice Holmes was in error when he said that there is no common law except the common law of a particular state. The common law applicable to a federal court under the Constitution is the common law of England before 1789, as developed in the federal courts since, just as in the case of principles of equity; and when Mr. Justice Holmes denied the existence of a "transcendental body of law outside of any particular state, but obligatory within it unless and until changed by statute," he was also in error, because the common law of England as applied by the federal courts is a part of the law of each state obligatory within the state in proper causes, just as is a federal statute. (See *Claflin v. Houseman*, 93 U. S. 130, 137; Second Employers' Liability Cases, 223 U. S. 1, 57, 58). A federal statute is obligatory within each state, and so are the decisions of the federal courts based on the general principles of law and equity administered by them in causes of which they have jurisdiction under acts of Congress, which acts are the supreme law of the land.

But if the common law of England, as developed by the federal courts in the exercise of their independent judgment, is "a transcendental body of law outside of any particular state" and should be denied existence, then, equally the principles of equity declared by the English courts of chancery prior to 1789, and developed by the federal courts in the exercise of their independent judgment is "a transcendental body of equity rules outside of any particular state," and should be equally denied existence.

The basic premise on which such reasoning rests is revolutionary in its consequences, and shatters the entire foundations of jurisprudence in the federal courts as they have existed from the beginning and as they have been declared by great judges from Marshall and Story down to the present date.

Strangely, no one has ever suggested that the exercise by the federal courts of their own independent judgment in the announcement of principles of equity derived from English equity jurisprudence is the pursuit of an unconstitutional course, or suggested the unconstitutionality of applying in the federal courts of equity anything other than state rules of equity. The rule to the contrary has been announced even more often and more positively than the rule of *Swift v. Tyson*, which, by the way, was a rule long accepted in the federal courts, even before Mr. Justice Story again announced it in 1842 in a construction of Section 34 of the Judiciary Act of 1789. See *Robinson v. Campbell, supra*, 3 Wheat. 212 (1818); *United States v. Wonson*, 1 Gall. 5, 20 (1812) Story, J., approved supra, *Slocum v. New York Life Ins. Co.*, 228 U. S. 364, 377.

The point is that, notwithstanding an occasional contrary voice, raised without considering the question in its broadest implications, *there is a federal common law recognized by the Constitution*, just as the Constitution recognizes general principles of equity jurisprudence derived from the High Court of Chancery of England, and not from the local conceptions of equity existing in the several states, and just as the Constitution has adopted the rules of the general maritime law.

In any event, it should be plain from the foregoing that there is no constitutional mandate that the rules to be followed in the federal courts, sitting at law or in equity, are the common law rules or the rules of equity jurisprudence as administered in the several states; the mandate is quite to the contrary.

At least, a Federal Court sitting in a particular state is just as much a court of final adjudication as

is a state court, and such a Federal Court is quite as competent to determine the law of that particular state as is a State Court. This the Constitution clearly intended; and a Federal Court cannot escape this duty, whether the local law be clearly declared on the particular point or not, and even if it be not declared at all.

Thus, that portion of the opinion in the instant case holding that an unconstitutional course has been followed by the federal courts, seems plainly ill-founded and ought to be quickly withdrawn. The question is clearly one only of statutory construction of an act of Congress in the exercise of its power to regulate the lower federal courts and to prescribe the rules of procedure, and the rules of decision, applicable therein, as was done in the Judiciary Act of 1789 and the Process Act of the same year, and of 1792.

The opinion of Justices Butler and McReynolds and the separate opinion of Mr. Justice Reed, that in no event is there anything involved except a matter of statutory construction, seems to be eminently correct.

2. If the question be considered solely one of statutory construction of Section 34 of the Judiciary Act of 1789—and certainly it should be nothing more, because the reconsideration of the rule of *Swift v. Tyson* should involve nothing more than the question whether the phrase "the *laws* of the several states" includes common law decisions of state courts as well as state statutes—then, of course, we consider whether the construction of an act of Congress made 96 years ago, and, though very occasionally questioned, often reaffirmed (by a unanimous court as late as April, 1937, *Bozeman v. Insurance Company*, 301 U. S. 196, 203-4) can now be justifiably disapproved, even assuming, solely for argument's sake, that the original construction was doubtful.

Congressional acceptance is conclusively presumed of a construction of an act of Congress after the lapse of a substantial period of time, with numerous sessions of Congress intervening without a change being made in the statute. *U. S. v. Elgin, etc., R. Co.* 298 U. S. 492; *Missouri v. Ross*, 299 U. S. 72; *U. S. v. Ryan*, 284 U. S. 167.

In *Baltimore & Ohio R. Co. v. Baugh*, 149 U. S. 368 (1892), the court said (p. 372):

> "Notwithstanding the interpretation placed by this decision upon the thirty-fourth section of the Judiciary Act of 1789, Congress has never amended that section; so it must be taken as clear that the construction thus placed is the true construction, and acceptable to the legislative as well as to the judicial branch of the government. This decision was in 1842."

If Congress was dissatisfied with the construction made of Section 34 of the Judiciary Act of 1789 in *Swift v. Tyson, supra*, all it needed to do at any time was to say, in substance, that the statutes and judicial decisions of the several states shall be the rules of decision in the courts of the United States in trials at common law. It never did so, but has at all times since its pronouncement accepted the construction made in *Swift v. Tyson*, in 1842.

The suggestion in the majority opinion that legislative relief has been proposed in recent years (Notes Nos. 20 and 21) is not persuasive. It argues rather in favor of the view that Congress, by not enacting these proposals, was satisfied with the construction of *Swift v. Tyson*.

The propriety of now overturning a statutory construction settled and reaffirmed by dozens of decisions necessarily constitutes a blow to the rule of *stare decisis*, from which that rule will have difficulty in ever recovering.

3. Mr. Warren's article in 37 Harvard Law Review, 49, 86, 87, concerning new light on the "rules of decision" act (Section 34 of the Judiciary Act of 1789) to which the majority opinion adverts, should also be regarded with caution.

Mr. Warren stresses the striking from the original draft of the word "statute" before the word "law," and broadening it to "laws," but does not give adequate effect to the striking of the phrase "and their unwritten and common law now in use." The facts which he has developed surrounding the legislative history of Section 34 of the Judiciary Act of 1789 are at least equally susceptible of the legitimate inference that by striking the phrase "and their unwritten and common law now in use" and substituting the word "laws" the First Congress did not intend to make the common law decisions of the several states rules of decision in the courts of the United States. It can well be argued that there was no occasion for striking the unequivocal particularlity of the original draft which referred to both state statutes and judicial decisions, unless it was intended that judicial decisions of the several states should be eliminated as rules of decision in trials at common law in the federal courts.

It will be remembered that the word "laws" had a well understood meaning in 1789, when both the Constitution and the Judiciary Act were adopted. The Judiciary Act was passed in 1789 to carry the provisions of the Judiciary Article of the Constitution into effect. Section 2 of that article extends the judicial power "to all cases in law and equity, arising under the Constitution and *laws* of the United States." The word "laws" very clearly meant "statutes."

Article VI, Section 2, of the Constitution, which provides that the Constitution and laws passed in pursuance thereof are the supreme law of the land, the laws of any state to the contrary notwithstanding, refers to the "laws of the United States" and to the "laws of any State," also meaning "statutes."

A cursory examination of the Judiciary Act of 1789 shows that the phrase "laws of the United States" appears several times (Secs. 9, 11, 17, 25) and the phrase "laws of the state," at least in one other place (Sec. 29), the word "laws" in each instance plainly meaning "statutes." A word is presumed to be used in the same sense throughout a statute, unless the context plainly requires a different meaning. *Pampanga Sugar Mills v. Trinidad*, 279 U. S. 211, 217 ("In the absence of express restriction it may be assumed that a term is used throughout a statute in the same sense in which it is first defined."); *Butterworth v. Commissioner*, 63 F. (2d) 944, 948.

Ellsworth may well have decided to use the word "laws" because so frequently used in the Constitution, and elsewhere in the Judiciary Act, in the sense of "statutes." He may also have stricken the word "statute" before "law" because he considered the word "statute" redundant.

But while the legislative history as developed by Mr. Warren is instructive, nevertheless it is a well settled principle that the legislative history of an act of Congress cannot be properly resorted to if the statute itself is clear in its meaning. *Wilbur v. U. S.*, 284 U. S. 281; *Kuehner v. Irving Trust Co.*, 299 U. S. 445; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1; *Barrett v U. S.*, 169 U. S. 218, 227.

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tutional command that the federal courts apply the varying common-law conceptions of the several states.

It seems manifest that when the Constitution referred to cases at law and equity, it referred to common law causes determinable according to the principles of the common law of England, and not according to the common law of any state, and to equity causes determinable according to the principles enunciated by the English court of chancery, and not according to the equity jurisprudence of any state—all subject, of course, to any modification that Congress might make by virtue of its powers over the jurisdiction of the federal courts. *Lauf v. Shinner Co.*, decided February 28, 1938, 58 Sup. Ct. 578, and cases cited.

If the rules in federal equity suits are "the principles applied by the English court of chancery before 1789, as they have been developed in the federal courts" (Mr. Justice Stone in *Gordon v. Washington*, 295 U. S. 30, 36), then the rules in actions at common law, where not affected by statutes, are the rules of the common law of England before 1789, as they have been developed in the federal courts. All of the cases where the point was squarely raised support this view.

Again, under the Federal Employers' Liability Act it has been held over and over again that actions cognizable under that statute are determinable according to the principles of the common law as interpreted by the federal courts, regardless of what may be local common law rules which might otherwise be relevant; and this federal common law is binding, and must be applied by the state courts when actions are brought therein falling within the class of injuries in interstate commerce within the purview of that act. *Chesapeake & Ohio R. Co. v. Kuhn*, 284 U. S. 44, 47, and cases cited; *Chesapeake & Ohio R. Co. v. Stapleton*, 279 U. S. 587; *New Orleans, etc., R. Co. v Harris*, 247 U. S. 367, 371-2.

It is held that Congress intended that the Federal statute should be applied in the light of these and other common law decisions of the federal courts prescribing a uniform rule. *Central Vermont Ry. v. White*, 238 U. S. 507, 512. Mr. Justice Holmes and Mr. Justice Brandeis have often concurred as to the applicability of this federal common law, even in actions in state courts cognizable under the federal act. (Ibid., and cases cited therein.)

Is this doctrine, or course of decision, also a supposed invasion of the rights reserved by the Constitution to the several states? But if it be conceded that Congress can make applicable to suits cognizable under the Federal Employers' Liability Act, the common law of England as interpreted by the federal courts, and not improperly referred to as the federal common law, must it not be equally conceded that under the Constitution Congress, in order to provide a uniform rule of decision in federal causes throughout the nation, can provide by statute that in the exercise of judicial power in suits at common law, the common law of England shall govern, as construed and developed by the federal courts, and not as developed in the several states? The Constitution and the Seventh Amendment have been so construed from the beginning, and no constitutional limitation in that regard has been intimated until the decision in the instant case.

Can there be anything involved here except a simple question of statutory construction, free of all constitutional implications?

With the most reverent and affectionate regard for his great genius and his memory, it is respectfully submitted that Mr. Justice Holmes was in error when he said that there is no common law except the common law of a particular state. The common law applicable to a federal court under the Constitution is the common law of England before 1789, as developed in the federal courts since, just as in the case of principles of equity; and when Mr. Justice Holmes denied the existence of a "transcendental body of law outside of any particular state, but obligatory within it unless and until changed by statute," he was also in error, because the common law of England as applied by the federal courts is a part of the law of each state obligatory within the state in proper causes, just as is a federal statute. (See *Claflin v. Houseman*, 93 U. S. 130, 137; Second Employers' Liability Cases, 223 U. S. 1, 57, 58). A federal statute is obligatory within each state, and so are the decisions of the federal courts based on the general principles of law and equity administered by them in causes of which they have jurisdiction under acts of Congress, which acts are the supreme law of the land.

But if the common law of England, as developed by the federal courts in the exercise of their independent judgment, is "a transcendental body of law outside of any particular state" and should be denied existence, then, equally the principles of equity declared by the English courts of chancery prior to 1789, and developed by the federal courts in the exercise of their independent judgment is "a transcendental body of equity rules outside of any particular state," and should be equally denied existence.

The basic premise on which such reasoning rests is revolutionary in its consequences, and shatters the entire foundations of jurisprudence in the federal courts as they have existed from the beginning and as they have been declared by great judges from Marshall and Story down to the present date.

Strangely, no one has ever suggested that the exercise by the federal courts of their own independent judgment in the announcement of principles of equity derived from English equity jurisprudence is the pursuit of an unconstitutional course, or suggested the unconstitutionality of applying in the federal courts of equity anything other than state rules of equity. The rule to the contrary has been announced even more often and more positively than the rule of *Swift v. Tyson*, which, by the way, was a rule long accepted in the federal courts, even before Mr. Justice Story again announced it in 1842 in a construction of Section 34 of the Judiciary Act of 1789. See *Robinson v. Campbell, supra*, 3 Wheat. 212 (1818); *United States v. Wonson*, 1 Gall. 5, 20 (1812) Story, J., approved supra, *Slocum v. New York Life Ins. Co.*, 228 U. S. 364, 377.

The point is that, notwithstanding an occasional contrary voice, raised without considering the question in its broadest implications, *there is a federal common law recognized by the Constitution*, just as the Constitution recognizes general principles of equity jurisprudence derived from the High Court of Chancery of England, and not from the local conceptions of equity existing in the several states, and just as the Constitution has adopted the rules of the general maritime law.

In any event, it should be plain from the foregoing that there is no constitutional mandate that the rules to be followed in the federal courts, sitting at law or in equity, are the common law rules or the rules of equity jurisprudence as administered in the several states; the mandate is quite to the contrary.

At least, a Federal Court sitting in a particular state is just as much a court of final adjudication as

is a state court, and such a Federal Court is quite as competent to determine the law of that particular state as is a State Court. This the Constitution clearly intended; and a Federal Court cannot escape this duty, whether the local law be clearly declared on the particular point or not, and even if it be not declared at all.

Thus, that portion of the opinion in the instant case holding that an unconstitutional course has been followed by the federal courts, seems plainly ill-founded and ought to be quickly withdrawn. The question is clearly one only of statutory construction of an act of Congress in the exercise of its power to regulate the lower federal courts and to prescribe the rules of procedure, and the rules of decision, applicable therein, as was done in the Judiciary Act of 1789 and the Process Act of the same year, and of 1792.

The opinion of Justices Butler and McReynolds and the separate opinion of Mr. Justice Reed, that in no event is there anything involved except a matter of statutory construction, seems to be eminently correct.

2. If the question be considered solely one of statutory construction of Section 34 of the Judiciary Act of 1789—and certainly it should be nothing more, because the reconsideration of the rule of *Swift v. Tyson* should involve nothing more than the question whether the phrase "the *laws* of the several states" includes common law decisions of state courts as well as state statutes—then, of course, we consider whether the construction of an act of Congress made 96 years ago, and, though very occasionally questioned, often reaffirmed (by a unanimous court as late as April, 1937, *Bozeman v. Insurance Company*, 301 U. S. 196, 203-4) can now be justifiably disapproved, even assuming, solely for argument's sake, that the original construction was doubtful.

Congressional acceptance is conclusively presumed of a construction of an act of Congress after the lapse of a substantial period of time, with numerous sessions of Congress intervening without a change being made in the statute. *U. S. v. Elgin, etc., R. Co.* 298 U. S. 492; *Missouri v. Ross*, 299 U. S. 72; *U. S. v. Ryan*, 284 U. S. 167.

In *Baltimore & Ohio R. Co. v. Baugh*, 149 U. S. 368 (1892), the court said (p. 372):

"Notwithstanding the interpretation placed by this decision upon the thirty-fourth section of the Judiciary Act of 1789, Congress has never amended that section; so it must be taken as clear that the construction thus placed is the true construction, and acceptable to the legislative as well as to the judicial branch of the government. This decision was in 1842."

If Congress was dissatisfied with the construction made of Section 34 of the Judiciary Act of 1789 in *Swift v. Tyson, supra*, all it needed to do at any time was to say, in substance, that the statutes and judicial decisions of the several states shall be the rules of decision in the courts of the United States in trials at common law. It never did so, but has at all times since its pronouncement accepted the construction made in *Swift v. Tyson*, in 1842.

The suggestion in the majority opinion that legislative relief has been proposed in recent years (Notes Nos. 20 and 21) is not persuasive. It argues rather in favor of the view that Congress, by not enacting these proposals, was satisfied with the construction of *Swift v. Tyson*.

The propriety of now overturning a statutory construction settled and reaffirmed by dozens of decisions necessarily constitutes a blow to the rule of *stare decisis*, from which that rule will have difficulty in ever recovering.

3. Mr. Warren's article in 37 Harvard Law Review, 49, 86, 87, concerning new light on the "rules of decision" act (Section 34 of the Judiciary Act of 1789) to which the majority opinion adverts, should also be regarded with caution.

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AMERICAN LAW INSTITUTE'S SIXTEENTH ANNUAL MEETING

Momentum Acquired During Past Fifteen Years Enables Institute to Prepare and Dispose of An Unusually Large Amount of Restatement Material—Final Drafts on Property and Torts Considered and Approved—Law of Property Act Approved—Various Tentative Drafts Considered—Address by Chief Justice Hughes a Notable Utterance—President Roosevelt Sends Best Wishes for Success of Work—Director Lewis' Report Outlines Material Submitted to Meeting, Gives Important Details of Work During Past Year, Speaks of Further Subjects Ripe for Restatement, and Expresses Conviction That the "Future of the Restatement" Is Assured—Mr. Goodrich, Adviser on Professional Relations, Fills in the Picture with Important Details—Banquet a Pronounced Success in Spite of Unavoidable Absence of Chief Justice Popham, Scheduled as One of the Speakers.

THE efficiency-momentum acquired as a result of fifteen years of experience was distinctly manifested at the Sixteenth Annual Meeting of the American Law Institute, held in Washington, D. C., May 12, 13 and 14. This manifestation related not only to the quantity and quality of the product submitted to the meeting, but also to the conduct of the meeting itself.

There were submitted 734 pages of Restatement, 245 pages of Explanatory Notes and 60 pages of Statutes and Comments thereon. As to the craftsmanship employed in producing this immense mass of material, Director Lewis says in his Annual Report: "We can, I think, truthfully say that the quality of the work being done and the usefulness of the comment accompanying the sections of the Restatement, have steadily improved during the years that have passed since the first one in June, 1923. We have learned from experience and we have had much experience."

As to the way in which the members gathered at the Annual Meeting discharged their important task of criticism and revision, it is pertinent to quote the observation of one of the most competent of them. When asked what was his outstanding impression of the recent meeting, he said without hesitation: "It was the high and satisfactory quality of most of the discussion of the various drafts submitted." By this, of course, he meant no reflection on what has gone on during previous years. The remark merely indicated, as is only natural, that the gathered momentum of the Association's work had its qualitative as well as its quantitative aspect.

Material Considered by Institute

The meeting had before it three tentative and one proposed final draft on Torts; three tentative and one proposed final draft on Property; a tentative draft on the restatement of the law relating to Security; a tentative draft of an Act relating to contributions among Tortfeasors; and a proposed final draft of a Property Act which had been considered in tentative form by the meeting last year. A more detailed statement of the material embodied in these various drafts will be found in the Annual Report of Director Lewis further on in this account of the meeting. Summing up here, it is sufficient to say that the tentative drafts were given careful consideration and various suggestions for changes were made, all of which were noted by the Reporters for consideration in connection with the revisions to come before the next meeting.

The proposed final drafts were approved, with the understanding, in one or two cases, that a few points which were raised in the discussion, but as to which the meeting was not prepared to take definite action, would be ironed out by the Reporter and the Council. An unusual course was taken with reference to Torts Tentative Draft No. 17 which deals with certain topics under "Interference with Business by Trade Practices." In view of certain considerations relating to the size of forthcoming Volume III on the Subject, and also to its satisfaction with the character of this Draft, the Council requested that this be considered as a Proposed Final Draft, so that, if approved, it could be included in Volume III of Torts. The suggestion was adopted as the discussion developed few points of difference, and the Institute thought these could be readily settled by further conference between the Reporter and Council.

Proposed Statutes Discussed and Acted On

Two drafts of proposed statutes were considered and acted upon by the Institute. The first was Proposed Final Draft No. 1 of a Law of Property Act. Its specific purpose, as stated in the introductory note of the Draft, "is to assimilate interests in real and personal property to each other, to simplify their creation and transfer, and to protect the owners of present and future interests." The Act was drafted in cooperation with the National Conference of Commissioners on Uniform State Laws, the note added, and when and if finally adopted by them and the American Law Institute, it will be designated the "Uniform Law of Property Act." It is not intended to publish it as the joint work of the two organizations until it is considered and adopted by the Conference at its forthcoming July meeting. In his report, Director Lewis predicted that no disagreement would occur over the wording of the Act that could not be reconciled in conference. The Draft was carefully considered and approved, with the suggestion that the Reporter and his advisers deal finally with certain suggested minor changes. The

other statute was the "Contribution Among Tort Feasors Act," Tentative Draft No. 1. This was considered and various suggestions made for the consideration of the Reporter and his advisers.

Director Lewis' report set forth fully the reasons for the recommendation of the Executive Committee to the Council that the Institute proceed no further with the Tentative Drafts on the Law of Airflight. He stated that the action was not to be taken as a condemnation of the fundamental principles which the drafts embody, but was due to the fact that it was realized that continuation of work on the Acts would probably delay the conclusion of the work of the Commissioners on Uniform State Laws, which work had been begun some time before the Institute signified its willingness to cooperate. "Furthermore," Director Lewis stated, "as the Acts are drawn, they present highly controversial questions affecting the growing business of transportation by air, on the correct solution of which we are not especially qualified to pass. The proposed Acts, therefore, are in a different class from those on Contribution among Tortfeasors and Property, which deal with matters pertaining to the common law and procedure."

Subjects to be Restated in Future

As to the future work of the Institute, Director Lewis states in his report that among the subjects which it desires to add to those already published or in the course of preparation are: Persons; the Divisions in Property Relating to the Rule Against Perpetuities and Accumulations, Covenants Running with the Land, and Conveyancing; the Division in Associations relating to Corporations for Profit and Partnerships; and Evidence, this latter in a somewhat modified form. This future program has been presented to the Carnegie Corporation, which now has it under consideration. However, as he points out, regardless of what may be done in the future by the Institute, the amount of work will be small in comparison with what has already been accomplished. And of the future of the Restatement, as already produced, he has no doubt. He looks forward to a steady increase in the Courts' recognition of it. The Restatement may also, he adds, be the nucleus from which three lines of useful scholarly legal work may develop; the translation of the Restatements into foreign languages, already auspiciously begun; the publication in English of a comparison of our law with the laws of other countries; and "a more intelligent study of what may be termed legal trends and the forces which adjust law and its administration to the needs of life."

Address by Chief Justice Hughes a Notable Utterance

One of the outstanding features of the meeting, as usual, was the address of the Chief Justice of the United States. Chief Justice Hughes gave an account of the work of the Court; paid a tribute to Justices Willis Van Devanter and George Sutherland, who recently retired, for their eminent services; emphasized the great need at this time for continued respect for the judicial tradition of independence and impartiality; pointed out significant steps which had been taken to cure certain defects in judicial administration; stressed the duty of the Bar to be vigilant in securing election or appointment of able and industrious judges, qualified by training, experience and temperament for the office; and concluded with certain pertinent comments relating to administrative agencies and the manner in which all tribunals, whether courts or administrative bodies, should discharge their duties.

After stressing, in this connection, the importance of the judicial standards of independence and impartiality, he said: "The community cannot afford to depreciate these accepted standards or to ignore the processes by which they are maintained. Administrative agencies, which we earnestly desire to succeed in discharging their important tasks according to the basic requirements of their authority, will achieve that end to the extent that they perform their work with the recognized responsibility which attaches to judges and with the impartiality and independence which is associated with the judicial office. Deliberation, fairness, conscientious appraisal of evidence, determinations according to the facts, and the impartial application of the law, whether the controversies are decided in the courts or in administrative tribunals, these are the safeguards of society. For the law is naught but words, save as the law is administered."

President Roosevelt Sends Best Wishes to Institute

Another notable feature of the meeting was a letter from President Roosevelt addressed to Director Lewis, in which he expressed his approval of the Institute's endeavor and best wishes for its success. The President's letter was as follows:

THE WHITE HOUSE

May 10, 1938

"Dear Mr. Lewis:

"I am happy to greet the judges, lawyers and law teachers who are attending the sixteenth annual meeting of the American Law Institute.

"I understand that you have now reached a point in your Restatement of our common law where there remain only a few though important, subjects which usefully can be restated at this time. Permit me to congratulate you on that which you have already accomplished. I hope that nothing will prevent your carrying on the Restatement until it is complete.

"In my letter to your annual meeting in 1936, I ventured to express the hope that, having produced a Model Code of Criminal Procedure, you would find yourselves in the position to undertake further work in the field of criminal law and administration. I again wish to emphasize the importance of such work. The seriousness of our crime problem in this country and the deficiencies in our administration of the criminal law rightly cause laymen to look to such an organization as yours to give direction and leadership.

"The painstaking, scholarly manner in which the Restatement has been done, and the distinction of those who have devoted themselves to it have caused the work to be recognized by most of the Appellate Courts of our states as prima facie authority as to what the law is. This achievement will go far to preserve our common law system by correcting uncertainties in the law which arise from the constantly increasing mass of case precedent.

"The strength of the common law was its hospitality to improvement. No one can read the legal record of the last year without appreciating that we in our day are again reshaping our legal philosophy to keep pace with the needs of our people and the spirit of our institutions.

"I extend cordial approval of your endeavor and best wishes for its success.

Very sincerely yours,
(Signed) FRANKLIN D. ROOSEVELT"

Mr. William Draper Lewis,
Director, The American Law Institute,
Mayflower Hotel,
Washington, D. C.

Proceedings in Detail

The meeting was called to order at 10 A. M., Thursday, May 12, by President George Wharton Pepper. The roll showed that 770 persons had registered either as Institute members or as invited guests. The highest courts of thirty-nine States and five Federal Circuit Courts of Appeal were represented by Judges at the meeting.

President Pepper announced that the administration of each President had some single outstanding characteristic and he had decided to make brevity the peculiar mark of his own. He would, therefore, not deliver an address, but would at once proceed to gratify the audience by introducing the Chief Justice of the United States. Chief Justice Hughes was received with great applause, the Institute rising in a body as he rose to speak. After delivering his address, which was listened to with close attention and which was later the subject of a great deal of discussion in the hotel lobbies, Mr. George Welwood Murray, the Treasurer, presented his report. He was followed by Mr. George E. Alter, who presented the report of the Committee on Membership, of which he is the Chairman. The reports of Director William Draper Lewis and of Mr. Herbert F. Goodrich, Adviser on Professional Relations, followed. They are printed further on in this account of the meeting.

At this point, the Nominating Committee composed of Judge Joseph C. Hutcheson, Jr., of Houston, Texas, Chairman, Henry W. Bikle, of Philadelphia, and Walter L. Flory, of Cleveland, Ohio, presented a report nominating the following for election to fill vacancies on the Council of the Institute: George E. Alter (former Attorney General of Pennsylvania), Rousseau A. Burch (former Judge of Supreme Court of Kansas), John G. Buchanan (Pittsburgh attorney), George Donworth (Judge of Supreme Court of Washington), Charles E. Dunbar (New Orleans attorney), Daniel N. Kirby (St. Louis attorney), Monte M. Lemann (New Orleans attorney), George Wharton Pepper (ex-senator from Pennsylvania, and President of the Institute), Orie L. Phillips (United States Circuit Judge), Marvin B. Rosenberry (Chief Justice of Wisconsin Supreme Court), Arthur P. Rugg (Chief Justice of Massachusetts Supreme Court), Elihu Root, Jr. (New York attorney) and Arthur J. Tuttle (U. S. District Court Judge, Michigan). There being no other nominations, these gentlemen were unanimously elected.

Consideration of Drafts Begins

Consideration of Torts Tentative Draft No. 17, containing most of the chapter on "Interference with Business by Trade Practices," and relating primarily to infringement of trade marks and trade names, was begun. Mr. Harry Shulman, of Yale University Law School, the Reporter, took the platform, explained points on which members desired information, and stated the reasons for the adoption of the wording of certain sections. As previously stated, the Council asked that this be considered as a Proposed Final Draft and the Institute dealt with it on that basis, finally approving it, with the exception of a few minor points which the Reporter and the Council were requested to settle. Torts Tentative Draft No. 18, containing a further title under the same head, was then briefly discussed. Consideration of Torts Proposed Final Draft No. 4, covering protection of interests in domestic relations, then followed, resulting in approval by the meeting. Consideration of the Law of Property Act Proposed Final Draft No. 1, for which Mr. A. James Casner, of the University of Illinois College of Law, is the Reporter, followed. The Act was approved by the meeting.

Hon. Learned Hand, Vice-President of the Institute, presided at the Friday sessions. Torts Tentative Draft No. 16, dealing with "Invasions of Interests in the Private Use and Enjoyment of Land (Private Nuisance)," for which Mr. Everett Fraser, of the University of Minnesota Law School, is the Reporter, was taken up and the customary discussion ensued. This was followed by consideration of Property Tentative Draft No. 9 on "Future Interests," containing Chapters 19, 20 and 21 covering the "construction of limitations purporting to create remainders or executory interests relating to the requirement of survival, the expression 'death or death without issue,' and miscellaneous provisions." Mr. Richard R. Powell, of Columbia University, Reporter for Property, took the stand and answered questions and objections and made note of various suggestions by members. Consideration of Chapter 18 on the same subject, in Property Tentative Draft No. 7, dealing with "General Rules of Construction," then followed, with Mr. Powell, the Reporter, still on the stand. This was followed by consideration of Property Proposed Final Draft No. 2, which contained suggested amendments and additions to Chapter 26, dealing with Powers of Appointment, which had been submitted last year to the meeting in Property Tentative Draft No. 7, but had not been considered because of lack of time. Both the Tentative and Proposed Final Draft were considered, and the latter was approved. Mr. W. Barton Leach, of the Harvard Law School, Reporter for the subject of "Powers of Appointment and Related Powers," explained various provisions in the draft.

Security Tentative Draft No. 2 was next taken up. Mr. John Hanna, of Columbia University Law School, is Reporter for this subject. The Draft dealt with the "Incidents of the Pledge Relationship" and the "Enforcement of a Pledge." Various suggestions were made which were duly noted by the Reporter for consideration. Property Tentative Draft No. 10, dealing with Easements and Profits in the Subject Servitudes was then discussed. Mr. Oliver S. Rundel, University of Wisconsin Law School, is Reporter for this particular subject. This was followed by consideration of the Contribution Among Tortfeasors Act, Tentative Draft No. 1, for which Mr. Charles O. Gregory, of the University of Chicago Law School, is the Reporter.

Banquet Sets High Standard of Entertainment

The banquet of the Institute was held on Friday night and so great was the demand for seats that a number found it impossible to secure them. The success of this banquet, at which President Pepper was Chairman, raises a question as to whether the American Law Institute is not insidiously extending its constructive activities in an entirely new direction, by furnishing a model of proper banquet speaking for other organizations. Those who were present agree that it was one of the most enjoyable on record and that

the speaking arrangements could not have been improved on.

The address of Chairman Pepper is printed elsewhere in this issue. It was followed by an interesting and instructive address by William Mather Lewis, President of Lafayette College, who spoke of the inadequacy of our educational system, declaring that "the dearth of far-seeing statesmen, industrialists, financiers and labor leaders at the present time may be traced to the type of education which has been demanded in a machine age." He paid his respects to those who clamor for the millenium, who would scrap the present social order, and expressed the opinion that "what is needed is quiet, unhurried, intelligent adjustment of the machinery of life to suit the needs of a new day. Such adjustment does not call for the abandonment of those great principles which for a century and a half have brought us safely through untold vicissitudes."

Chief Justice Popham Unable to Attend

The next speaker on the dinner program was Chief Justice John Popham, of England. Chief Justice Popham was not present at the table at the moment, and Chairman Pepper seized the opportunity to give the audience a little information as to some of the circumstances of Chief Justice Popham's life—among them his earlier exploits as a highwayman. The idea was, of course, that the audience, thus apprised of the circumstances, would refrain from remarks calculated to embarrass him or hurt his feelings. However, at this moment a telegram arrived from the Bureau of Vital Statistics in London stating that the Chief Justice had died in the early 1600's, and therefore would not be able to be present. This unexpected development threatened to throw the program into confusion, but the Chairman rose to the occasion and happily secured as a substitute Mr. W. Barton Leach, of the Harvard Law School, who obliged with his well known accordion accompaniment. The details of this happy solution of what threatened to become a serious situation will be found in the latter part of Chairman Pepper's address, as published further on in this issue.

Other Interesting Social Features

Among the other interesting social features of the meeting were the reception by the Council to members, ladies and guests accompanying them, on the evening of May 11 in the Ballroom of the Mayflower Hotel; the reception at the White House by Mrs. Roosevelt, on Thursday afternoon, May 12; a reception and tea for members, guests and ladies on Thursday afternoon in the Mayflower Hotel; and a reception by Mr. and Mrs. George Maurice Morris in their home, "The Lindens," on Friday afternoon, May 13.

Report of Director William Draper Lewis

AFTER a "Foreword" in which the Council of the Institute pays a tribute to the memory of Senator Atlee Pomerene, former member of the Council, who died during the past year, and records its "grateful appreciation of his faithful service and a sympathetic understanding of the loss sustained by those who were near and dear to him," Director Lewis's report continues:

Communication to the Carnegie Corporation

"In view of the fact that our present assets applicable to Restatement work will be exhausted on December 31, 1939, the Executive Committee of the Council as a result of a thorough discussion of the matter prepared and sent to the Carnegie Corporation a communication setting forth the progress of our work and the subjects, in addition to Security, Torts, and the Divisions of Property on whch we are now engaged, which should be restated to complete the Restatement of the Law as far as present legal development makes our law ripe for restatement. Among the subjects which we are desirous of being in a position to add to those already published or in the course of preparation are: Persons; the Divisions in Property relating to the Rule Against Perpetuities and Accumulations, Covenants Running With the Land, and Conveyancing; the Division in Associations relating to Corporations for Profit and Partnerships; and Evidence, this latter in a somewhat modified form. The Carnegie Corporation has the matter under consideration.

Publication of the Law of Restitution

"At your meeting in May, 1936, after discussion and final amendment you approved and authorized the publication of the Restatement of the Law of Restitution, the expectation being that it would be published in the fall of that year. As I stated in my annual report last May the Executive Committee of the Council in the summer of '36 took the responsibility of postponing the publication for a year; this action being taken on the advice of the American Law Institute Publishers, the organization which prints and distributes the Restatement. The main reason for the advice was the fact that in the fall of '36 we were also publishing the first two volumes of Property. Last fall, however, the volume containing the Restatement of Restitution appeared, it being the twelfth volume of the Restatement to be published. Mr. Goodrich, our Adviser on Professional Relations, in his report will deal with its reception by the profession. There is probably no volume of the Restatement which in its treatment of the subject with which it deals represents more valuable constructive work. Many of us have long thought that the existing confusion and other difficulties of comprehension in the law formerly dealt with under the titles of Quasi Contracts and Constructive Trusts could be best clarified by combining these subjects and incidental allied matters as a single subject. The reception which you gave to the tentative and proposed final drafts as well as the reception which has been given to the published volume fully justifies our opinion."

The report then explains why the Executive Committee of the Council had felt it advisable to postpone publication of the third volume of the Restatement of the Law of Torts for another year. The proposed final draft for this volume, it stated, had been approved at the Institute's meeting last year, and it was expected that the volume would appear in a few months. However, the Council, on consideration of the number of pages which would be required to complete the restatement of the subject, had concluded that an increase in the material in volume III might render it possible to include the entire remainder of the material in a fourth

volume. With this idea in mind—of avoiding if possible a fifth volume—the Council had postponed publication, and requested the meeting to consider Torts Tentative Draft No. 17, containing the Chapter on Interference with Business by Trade Practices, as a Proposed Final Draft so that, if approved, it might be included in the third volume.

The report then spoke of the reorganization of the work on Torts, due to the illness of Professor Bohlen, and then outlined the material submitted for the consideration of the meeting as follows:

Material Submitted for Consideration

"Since the meeting a year ago there have been thirty-two conferences of the editorial force occupying 116 days. At these conferences thirty drafts varying from ten to one hundred pages each were considered. During the period of the year when law schools are in session the conferences usually last four days; those held in the summer and early fall, from five to six days. Our Reporters, as you are aware, are all members of the legal teaching profession. Among the Advisers are seven judges, seven practicing lawyers, and twenty-four law professors. Seven members of the Council are acting on one or more groups as Advisers.

"The material submitted for your consideration is primarily the result of the labor of this editorial force. For the past four or five months practically all the groups have been working on material which it is hoped to submit to you a year from now. . . .

Tort Drafts

"You have before you relating to the Restatement of Torts three Tentative and one Proposed Final Draft, covering the Chapters on Interference in Business by Trade Practices, Nuisance, and Interference in Domestic Relations, respectively. The draft relating to Interference in Business by Trade Practices I have already spoken of. There have been only two or three other matters in the Restatement as difficult to deal with as the law pertaining to Nuisance. The Reporter, Mr. Fraser, and those others of us who have labored over it are looking forward with interest to your reaction to the approach we finally adopted, believing it to be best suited to solve the many difficulties of the subject. The Proposed Final Draft on Interference in Domestic Relations, including as it does all the amendments, modifications and additions suggested as the result of the discussion of last year's Tentative Draft of that Chapter, represents a considerable revision. On this revision the principal work has been done by Messrs. Goodrich, Branch and Eldredge.

Property Drafts

"Last year there was presented for your consideration Property Tentative Draft No. 7 (Group No. 1) covering the Introduction to Part III—Creation, Chapter 18 on General Rules of Construction, and the first part of Chapter 26 on Powers. There was not time at the meeting to consider this draft though of course it has been in the hands of the membership of the Institute for more than a year. As you have been notified, consideration should be given to it now as well as consideration to the three other Property drafts distributed in April.

"Of these three drafts, Property Tentative Draft No. 9 (Group No. 1) marks the conclusion of the Chapters on the large and difficult division relating to Future Interests, with the exception of the concluding Chapter which will deal with Class Gifts. A Preliminary Draft covering the first part of that matter has been prepared by the Reporter, Richard R. Powell, and the Associate Reporter, A. James Casner, for consideration at an important conference later this month. As you are aware, Class Gifts is one of those matters in our law which is very difficult to deal with. The progress already made, however, gives reasonable assurance that with hard work and several conferences there is a possibility that all the Sections relating to the matter may be presented to the Council next February.

"Property Tentative Draft No. 10 (Group No. 2) covers Chapters 3 and 4 on Easements and Profits in the Subject Servitudes. A year from now we expect to ask you to consider the last two Chapters, on Extinguishment and Protection Against Third Persons, on which the group, with Oliver S. Rundell as Reporter, is now working.

"Property Proposed Final Draft No. 2 (Group No. 3) marks the conclusion of our work on the Sections relating to Powers which was begun in 1935. Should you approve and authorize the publication of this Chapter on Powers, the Executive Committee will ascertain whether it is practicable to make this part of the Property Restatement available to the profession in the near future even though its publication in the official volumes of the Restatement must necessarily be delayed until the publication of the third volume of the Law of Property, the Chapter on Powers being a Chapter which should come after and next to the Chapter on Class Gifts.

Security

"Tentative Draft No. 2 on the Restatement of the Law relating to Security contains the concluding Sections on the division pertaining to Pledges. The work done by John Hanna, the Reporter, and his Advisers has gone far to clarify in the mind of your Director this often erroneously assumed simple subject. I have confidence that the study of the Sections will have a similar beneficial effect on many present and future members of our profession.

"The Security group, continuing with Mr. Hanna as Reporter, after concluding their present work on Possessory Liens, will take up the division relating to Suretyship.

Statutes

"Besides the drafts relating to the Restatement you are asked to consider a first tentative draft of an act relating to contribution among tortfeasors, work on which was begun in August, 1936, and also a proposed final draft of a Property Act, the draft being a revision of the tentative draft considered by you last year.

"Each of these acts is designed to correct more or less obvious defects in the existing law as we are obliged to state it in the Restatement because of the weight of case authority. The work, as explained on the title page of each of the drafts, has been done in cooperation with the National Conference of Commissioners on Uniform State Laws. I should also add that the drafting of each of the acts was suggested by the members of the editorial groups working on the pertinent Sections of the Restatement.

"Should you approve, or approve as amended by you, the proposed final draft of the Property Act it will not be published as an official draft until the meeting of the National Conference of Commissioners on Uniform State Laws has an opportunity to discuss it. They are scheduled to meet next July. Should our two organizations fail to agree it is provided under our cooperating agreement that each organization may proceed independently. I venture to predict, however, that no dis-

(*Continued on page* 488)

ADDRESS BY CHIEF JUSTICE HUGHES

WHEN, under the presidency of Mr. Taft, it was suggested that the Supreme Court should have a separate building, Chief Justice White strongly objected. Among other grounds, he feared that the removal of the Court from the Capitol might cause a loss of public interest. The Court would be isolated and might largely be ignored. So far as I can judge from the course of events, that fear has not been realized. Nor do we lack visitors. Our records show that over 88,000 visited the Supreme Court Building during the month of April and in one day the number was nearly 7,000.

I am fond of recalling that Professor Hiram Corson, of Cornell University, a distinguished scholar of his day, on returning to Ithaca from a visit to New York where he had witnessed a lavish production of a play of Shakespeare, confessed to some disappointment.—"Why," he said, "when the curtain rose, the audience applauded the scenery." I imagine that the audience was really interested in the setting because of their interest in the drama.

The work of the Court continues in volume and importance. When we began the present recess, on May 2d, our statistics showed that we had disposed during the present term of 878 cases as against 820 in the corresponding period of last Term. The number of cases on our dockets had increased this Term by 65. We expect to adjourn at the end of this month with all cases disposed of which were ready for hearing.

The past year has witnessed the retirement of two of our most eminent Judges, Willis Van Devanter and George Sutherland. I cannot allow this opportunity to pass without a tribute to their service. Justice Van Devanter began his judicial career 49 years ago as Chief Justice of the Supreme Court of Wyoming. His service on the federal bench began in 1903 as Circuit Judge in the Eighth Circuit, and in 1911 he came to the Supreme Court. It is unnecessary to remind this body of judges and lawyers of the vast importance of the work of the Court which, unspectacular and hence largely unnoticed by the press and the public, goes on from day to day demanding unremitting industry and technical competence. The public are naturally interested in the great divisive cases in constitutional law, but these are few and constitute but a small part of the burden which the Court constantly bears. In the discharge of its work the conference of the Court is of the greatest importance as there the Court discusses and decides the cases which have been heard and passes upon the applications for permission to be heard. It was in that conference that Justice Van Devanter's wide experience, his precise knowledge, his accurate memory, and his capacity for clear elucidation of precedent and principle, contributed in a remarkable degree to the disposition of the Court's business. And aside from his broad knowledge of the law he had enjoyed the opportunities for special training in public land law which made his participation in that class of cases of peculiar value. Few Judges in our history have rivaled him in fitness by reason of learning, skill and temperament, for the judicial office.

Justice Sutherland came to the Court after a notable public career as a member of the House of Representatives and the Senate of the United States. Like Justice Van Devanter, he had his training in the West and he was familiar with all the peculiar problems of the new States formed from our great western acquisitions. He had a special aptitude for the law, and his powers of analysis and exposition, his industry and thoroughness, have made his judicial opinions a highly important part of the jurisprudence of the Court. He has been the embodiment of judicial integrity—conscientious and independent. Bearing his full share of the work of the Court, unflagging in his labors, he never failed in courtesy and his keen sense of humor and his rare ability as a raconteur made his companionship one of the special privileges of the intimate association of the members of the Court. We honor these Judges in their retirement and we cherish the memory of their fidelity to the best traditions of the bench.

I question if there is any greater need at this time than continued respect for the judicial tradition of independence and impartiality. It is in the judicial process that we find the most developed and systematic effort of a democratic community to maintain the interests of justice by opposing reason to passion, accepted principles to unbridled discretion, and the requirements of fair play to the favoritism or tyranny of power. The defects in judicial administration, which have made the public critical and restive, and which sometimes have obscured in public estimation the service of the courts, have been due in part to the law and in part to lawyers and judges. The law has lacked clarity, has maintained an unnecessarily complex procedure, and has permitted obstacles to be interposed to the prompt disposition of controversies. Too many lawyers have made the practice of their art a display of skill in avoiding or delaying the determination of cases on their merits by resort to technical obstructions. And, here and there, we find a judge who by pettiness, petulance, arbitrary conduct or procrastination in rendering decisions, has brought his office into disrepute. Despite all the just complaints addressed to these shortcomings, the judicial tradition still stands forth in testimony to the endeavor of the people to be just and to maintain their rights against the varied opportunities for partiality and oppression in administration.

You have been busy for years in the undertaking to reduce the complexities of the law, to give it, so far as possible, needed clarity and simplicity, and the value of your efforts is receiving increasing recognition as the courts use and cite the Restatements issued by this Institute. Judicial councils in a number of States are watching and appraising the work of the courts. In the federal sphere, the Supreme Court, sometime ago, under the Act of Congress of 1933, formulated rules which have expedited proceedings on appeals in criminal cases. Recently the Supreme Court sub-

mitted to the Congress, under the Act of 1934, a body of rules of civil procedure so as to provide one form of civil action and procedure for both cases in equity and actions at law. To make this possible, the Supreme Court enlisted the services of a distinguished body of practicing lawyers and professors of law who had specialized in the study of procedure. Their proposals were submitted to the consideration of the bench and bar of the country and have been widely discussed and approved. The Supreme Court examined these proposals and with certain changes adopted them. Under the statute they are to go into effect after the close of the present session unless Congress shall provide otherwise. Thus in the recent years we have witnessed a series of outstanding efforts to remedy the defects in the law, so far as these are responsible for unnecessary obstacles to obtaining as speedy justice as is consistent with a fair and full hearing.

With respect to the federal courts, also, the Judicial Conference of Senior Circuit Judges annually considers the state of the work in the various districts and circuits and recommends such additional judges as seem to be required. The progress in the prompt disposition of cases is noteworthy and most gratifying. The last report of the Judicial Conference shows a greater number of districts in which the trial dockets are said to be current; that is, where all cases in which issue has been joined and which are ready for trial are disposed of not later than the term following the joinder of issue, except cases continued at the request of counsel. It appears that in the fiscal year 1934, there were only 31 districts of which that could be said; in 1935, 46 districts; in 1936, 51 districts; while, in 1937, the Attorney General's report showed that the work of the district courts was thus current in 68 of the 84 districts exclusive of the District of Columbia. That report also showed that the same condition prevailed in some divisions of four other districts, and as to certain types of business in five other districts. In some districts, equity cases may be tried even between terms, if ready. The survey made by the Judicial Conference clearly indicated that the question of delays in the trial of cases after joinder of issue was one that should be considered with respect to particular districts and afforded no just ground for general criticism of the work of the district courts. Recommendations for additional judges to make possible the more prompt disposition of work in congested districts are now pending in Congress. The Judicial Conference is an institution of great promise, whose supervisory functions could wisely be extended.

Still the prime necessity in making the judicial machinery work to the best advantage is the able and industrious judge, qualified by training, experience and temperament for his office. He can accomplish much with a poor procedural system and the improvement in rules of procedure vastly increases his opportunity. We are fortunate in the great number of such judges that we have throughout the country and only the ill-informed or ill-disposed would overlook that fact. It is the exceptions among the judges, who, with their conspicuous ineptness, do the harm and they need such admonition as it may be practicable to give under our system. But the maintenance of the standards of judicial office rests chiefly with the electorate, where judges are elected, and with the appointing power, where they are appointed, and in both relations a vigilant bar through its organized effort to secure good judges should exercise, and should constantly seek to exercise, a potent influence. The bar in each community well know who are fitted by ability and character for the work of the courts.

There is another relation in which the judicial tradition has, and should have increasingly, a helpful influence. The complexities of our modern life have brought into play rules of conduct which demand for their enforcement new machinery, and it results that a host of controversies as to public and private right are not being decided in courts. The multiplication of administrative agencies is the outstanding characteristic of our time. As I said some years ago, the demand for such agencies arises from "a deepening conviction of the impotency of legislatures with respect to some of the most important departments of law making. Complaints must be heard, expert investigations conducted, complex situations deliberately and impartially analyzed, and legislative rules intelligently adapted to a myriad of instances falling within a general class." Administrative agencies "informed by experience," and which have shown their capacity for dealing expertly with intricate problems, as, for example, in the case of the Interstate Commerce Commission, have won a very high degree of public respect. I notice that there is a tendency, in the desire to emphasize the importance of obtaining flexibility and expertness in particular classes of cases, to depreciate the work of the courts and by comparison to exalt administrative boards and commissions. Such efforts are short-sighted and are not in the interest of the suitable development of administrative agencies. It must be remembered that to the courts the community still looks for the standards of judicial conduct. The controversies within the range of administrative action may be different and extremely important, and they may call for a particular type of experience and special methods of inquiry, but the spirit which should animate that action, if the administrative authority is to be properly exercised, must be the spirit of the just judge. Whatever the shortcomings of courts, and whatever the need of administrative bodies, it is still the courts which stand out as the exemplars of the tradition of independence and impartiality. This is because judicial institutions, as we understand and support them, have won their place and established their standards through the historic contest against the abuses of power. So far as it is humanly possible under the conditions of democratic organization, judges are as a class supposed to be removed from political influence, to be guided by principle and not by sentiment or passion, and habitually to adhere to the requirements of the law in a conscientious endeavor to ascertain and apply them. This tradition should be cherished and not weakened by disparaging the institutions which embody it. Judicial work also has the advantage that those who are responsible for its results are identified. The judge who decides stands before the public as responsible for the decision.

The community cannot afford to depreciate these accepted standards or to ignore the processes by which they are maintained. Administrative agencies, which we earnestly desire to succeed in

discharging their important tasks according to the basic requirements of their authority, will achieve that end to the extent that they perform their work with the recognized responsibility which attaches to judges and with the impartiality and independence which is associated with the judicial office. Deliberation, fairness, conscientious appraisal of evidence, determinations according to the facts, and the impartial application of the law, whether the controversies are decided in the courts or in administrative tribunals, these are the safeguards of society. For the law is naught but words, save as the law is administered.

We cannot change human nature. We cannot expect perfection in the discharge of duty either in or out of courts. But if we hold strongly to our standards, defects will gradually be remedied, delinquencies will be suitably rebuked, and the democratic ideal demanding equal justice under law will be more fully attained.

PRESIDENT PEPPER'S ADDRESS AT BANQUET

MEMBERS OF THE AMERICAN LAW INSTITUTE: DISTINGUISHED GUESTS; LADIES AND GENTLEMEN: It is hard to realize that a whole year has elapsed since last we dined together. And yet in no shorter time could the prodigious amount of work have been accomplished which our smiling Director outlined yesterday in his report. It is true that only one volume has been published—the volume on Restitution: but several others are in an advanced stage of preparation and by next autumn we should be able to stifle the hunger cries of a waiting world.

Meat for the Morbid Student

Without disparaging other subjects, I think I can say that Torts continues to be the favorite with those of us who have a slightly morbid taste. The forthcoming volume will contain, among other live topics, a fascinating chapter on Interference with Dead Bodies. This will be found to be a convenient handbook for all who are contemplating this pleasing activity as well as for those who prefer to rest in peace. The section on the Etiquette of Grave Robbing is particularly timely. Indeed this is the kind of book in which the reader can readily bury himself. Of more romantic interest, however, is the chapter on Interference with Rights in Domestic Relations. Those who, like me, are a bit old-fashioned, find ourselves sighing for the simpler terminology of the Ten Commandments; but I bow to the tendency of the erudite to find new names for the same old things. After all, we shall at least recognize the Seventh Commandment when it reads "Thou shalt not interfere with thy neighbor's right to an undisturbed Domestic Relation." Anybody contemplating the breaking up of a family can learn from this chapter a lot of effective plays which of himself he might not have thought of. On the whole I think it fair to say that this eagerly awaited volume will justify our habitual preference for wrongs rather than rights.

While the Institute has published only one volume during the year, two other notable books have appeared in the field of law. One is the Folk Lore of Capitalism by Professor Arnold of Yale. The other is The Law and Mr. Smith by Professor Radin of the University of California. I commend both of these books to you as most interesting reading, especially in connection with the Institute's publication. Arnold's book deals with the more or less gentle art of taking other people's property away from them. The Institute's restatement of Restitution deals with the less popular but highly important art of getting it back again; while Radin's book rationalizes both processes. With these three in hand the thoughtful reader may await with calmness the next move of the divinities who shape our ends.

Comfort from Professor Radin

Speaking of Professor Radin's book, the chapter which gave me most comfort was the one that demonstrates that you can't effectively abolish lawyers. Several times in recent years I have supposed myself on the verge of abolition and at my time of life this would be very disturbing, especially in view of the unsettled state of the law regarding dead bodies. But it seems that lawyers perform a necessary function and that until all conflicting human interests are permanently reconciled, lawyers will have their place. Accordingly I have renewed the lease of my office for another year. The ladies present will, I hope, be pleased with the assurance that, like the other poor, the lawyers will always be with them. I consider Professor Radin is entitled to the Congressional Medal of Honor.

Speaking of decorations, whenever I see a general or an admiral or any other man of war arrayed in all his glory I envy him the rich assortment of ribbons and medals which upon his manly bosom he displays with becoming modesty. The sight almost makes me glad the World War lasted so long, because it gave so many people a chance to win it. The only comparable decorations are those of ladies of patriotic organizations—who in the nature of things have much more adequate facilities for pectoral display than anything the male can boast. It seems to me, however, unfair that we men of peace should have no decorations to wear although we have richly deserved them. If I had my way I should literally cover our heroic Director, Dr. Lewis, with medals, each signifying some notable dialectic victory over an obstinate reporter or signalizing a triumph over the Council on the rare occasions when that body has ventured to disagree with him. Our two vice-presidents, Judge Learned Hand and Mr. Howard, are certainly entitled to be decorated for the patience with which they have endured the persistent longevity of their president. Our reporters, too, have deserved well of the Republic. Just what form of decoration would be appropriate is a question to be decided in each particular case. Those professors who are evidently well-washed, and there are such, might be made Knights Commander of the Bath, while those who habitually display an aching void between the cuff of their trousers and their

wrinkled socks might with advantage be given the Order of the Garter. *Honi soit qui mal y pense.*

Two Greatly Neglected Heroes

But among those pacific heroes who have hitherto been most shamefully neglected there are two whom I should like to mention specifically. I am one and the first of our two speakers of the evening is the other. It is not generally known that he and I, acting in concert, really made it possible for the generals and admirals to win the war; yet they are decorated and we are not. Back in the early days of the war, Bright Ideas about how to win it were plenty and there were as many patriotic organizations as there were Bright Ideas, each insisting that the war must be won in accordance with its own bright particular idea or not at all. There was a moment when all these Bright Ideas were dead-locked. Generals and admirals were helpless and our whole war program was brought to a standstill. At that critical moment William Mather Lewis and I stepped forward as modestly as David did when he went to meet Goliath. We proceeded to organize a nation-wide federal union of patriotic and defense societies. We coordinated their activities, gave direction to their enthusiasm, broke the log-jam and opened the way for the final assault on the Hindenburg line. If you think that this was accomplished without risk of bodily harm on our part, you are much mistaken. Remember that hell hath no fury like a non-combatant, and at the outset all these furies concentrated upon Lewis and me. But I have come to believe that there is some magic in the name of Lewis. Whether it's a matter of standing up and taking it or sitting down and striking it—the Lewises have an uncanny way of getting what they want. Indeed it seems to me that Lewis hath charms to soothe the savage breast—at least if his first name is William. It is quite immaterial whether his middle name is Mather or Draper.

But it isn't merely as a belated reward for winning the World War that our guest has been invited here tonight. He is not only a successful pacificator but a distinguished educator; and as President of that fine old institution, Lafayette College, he is rendering notable service in the field of higher education. It is in part for this reason that we have asked him to speak to us tonight. He is under no illusions respecting American youth. He is not one of those who believe that because you are young you necessarily know it all; and my impression is that he gets his results rather by holding the mirror up to nature, thus letting the boys see themselves as they really are—instead of engaging in that popular modern type of inflation which enlarges the head of youth rather than his mind. Our friend disclaims it, but I prefer to believe that it was he who described higher education in America as the process of casting artificial pearls before real swine.

Mr. President: in order that the performance may proceed, we of the Institute are willing (but without prejudice and only for the purposes of the argument) to take the part of the swine—and we now request you to scatter before us such pearls as you think we are capable of appreciating. All we ask is that you reserve the artificial ones for the young and give us the genuine article.

(Dr. William Mather Lewis then delivered his address, after which President Pepper continued.)

That's the sort of talk I like to hear. I would say that the President talks straight from the shoulder, were it not for the implication that his address has no source higher than the shoulder: and we all agree that that is the reverse of the truth. We are grateful swine, Mr. President, but (true to our type) we could have wished you to feed us some more.

Distinguished Jurist from Overseas Next on Program

We are now ready for the second speech of the evening. It was a bold move on the part of the Institute to invite a distinguished jurist from over-seas. Realizing the pressure on the English judiciary—who differ from ours in numbering no gentlemen of leisure in their ranks—our plan was to have him fly both ways between London and New York and between New York and Washington so that he would be absent from Westminster Hall only over the week-end. The trans-atlantic plane reached New York today exactly on schedule and the connecting Washington plane is due almost at this moment—so that I may with safety proceed with my introductory statement in the hope that he will be entering as I conclude. This frees me from the embarrassment which I might feel in his presence, in view of some of the things I propose to say.

The fact is that John Popham is a remarkable example of misspent youth and useful maturity.

You may think me churlish to intimate that the conduct of the Lord Chief Justice was not always in accordance with judicial standards. But you must remember that the English are much more matter-of-fact than we. They talk of their own and their neighbor's foibles with a frankness which we seldom imitate. Take this matter of judges. Our standard for the judiciary is an exalted one; and it is not enough that a judge should be exemplary now: he must always have been a paragon of virtue; he must have been a good little boy and, as an adolescent, he must have been a stranger to all the lapses in conduct to which other young men are prone. At the bar, if he had any clients, he must always have comported himself with all due fidelity to their interests and with entire disregard of his own. In short, to hold judicial office during good behavior means, with us, good behavior as well in the past as in the present and in the future; and this probably explains why so many judges are exceedingly reticent about the details of their early lives. As our standard is too exalted for human achievement, we have made of it a convenient fiction and, no matter what the facts, nobody would dare to make about an American judge such a statement as I have made about Sir John Popham.

Now contrast all this with the English point of view. I hold in my hand a recognized biographical record of the English judges. In Chapter VI, I read as follows:

"It seems to stand on undoubted testimony, that at this period of his life, besides being given to drinking and gaming,—either to supply his profligate expenditure, or to show his spirit, he frequently sallied forth at night from a hostel in Southwark, with a band of desperate characters, and that, planting themselves in ambush on Shooters' Hill, or taking other positions favorable for attack or escape, they stopped travelers, and took from them not only their money, but any valuable commodities which they carried with them,—boasting that they were always civil and generous, and that, to avoid serious consequences, they went in such numbers as to render resistance impossible. We must remember that this calling was not then by any means so discreditable as it became afterwards; that a statute was made during Popham's youth by which, on a first conviction for robbery, a peer of the realm or lord of

parliament was entitled to benefit of clergy *'though he cannot read'*; and that the traditions were still fresh, of robberies having been committed on Gad's Hill under the sanction of a Prince of Wales. The extraordinary and almost incredible circumstance is, that Popham is supposed to have continued in these courses after he had been called to the bar, and when, being of mature age, he was married to a respectable woman. At last, a sudden change was produced by her unhappiness, and the birth of a child, for whom he felt attachment. . . ."

From this point the record proceeds to chronicle his career at the bar, his exploits in the office of Solicitor General and of Attorney General and finally his appointment to be Chief Justice of England. I doubt if any Solicitor General or Attorney General of the United States has had a more lurid past than he; and even those of them who have favored redistribution of wealth have adopted more refined methods of appropriation than to lie in ambush on Shooters' Hill. However, we are all human: we all have a sneaking admiration for the successful highwayman. And so it seemed to those of us in charge of the arrangements for this dinner that no guest would be more welcome than this extraordinary man—and that many of us would have toward him that feeling of comradeship which exists between those whose vices are the same. In a moment or two, therefore, I expect to be able to present him to you and I hope you will give him the warmest sort of a welcome.

(At this point a telegram was brought in, the President read it and had a whispered consultation with his colleagues. He then proceeded.)

Ladies and Gentlemen: It is with difficulty that I control my voice sufficiently to read you the cablegram which has just been handed to me. It reads as follows:

"London, May 13, 1938. I regret to inform you that the Rt. Honorable John Popham, Chief Justice of England, is unable to be with you this evening. The record of which I have the honor to be official custodian discloses that he died on June 1, 1607, in the 72nd year of his age.

"Richard Ritem, Chief of the Royal Bureau of Vital Statistics."

This wholly unexpected development makes necessary a sudden change in our plans. I declare that an emergency exists—and I ask you, one and all, to cooperate with me in saving our program from collapse. As I look over the audience my eye lights on the commanding figure of Professor Barton Leach of the Harvard Law School. If you are like me you recall with delight the contribution he made last year to the success of the dinner. Do you feel inclined to ask him to fill the place on our program left vacant by the demise of Chief Justice Popham?

(The audience is heard from.)

Professor Leach—you have heard the insistent call of your fellow-citizens. Many a man has run for the highest public office on a far less spontaneous summons from the electorate. Although I understand that Latin is outmoded at Harvard—even so you will permit me to remind you that "Vox populi est Vox Dei"!

(Professor Leach consents on condition that an accordion can be produced.)

You have heard that nothing stands between us and our heart's desire except the lack of an accordion. I am sure that somebody in this great audience must have brought an accordion with him. I can picture some foresighted man saying to himself "I'm going to Washington—where anything may happen without warning. I think I'll take my accordion along and so be prepared for all eventualities." Am I right? Can anybody help us out?

(An accordion is produced.)

Thank you, my dear Sir! You are entitled to the thanks of the Institute—at least accordion to my way of thinking!

Professor Leach—the meeting is yours! We have heard much lately of the "Folk-Lore of Capitalism." I suggest that you favor us with the "Folk Songs of Liberalism."

Ladies and Gentlemen: I present the modern Orpheus—Professor Barton Leach of Harvard University.

(Professor Leach thereupon functioned with his well known efficiency.)

JUNIOR BAR NOTES—PROGRAM FOR CLEVELAND MEETING, ETC.

By Paul F. Hannah

Secretary Junior Bar Conference

A PROGRAM which promises that the Cleveland meeting of the Junior Bar Conference will lack nothing in interest, entertainment and eloquence has been designed by Ronald J. Foulis' Program Committee and approved by the Council.

The principal speakers will be President Arthur T. Vanderbilt of the American Bar Association and Paul Bellamy, editor of the Cleveland *Plain Dealer*. Mr. Bellamy, a gifted speaker and leader of the Fourth Estate, has a wide range of personal experience to draw from in talking to the Conference on the general subject of the press and the bar. Beginning his career as a reporter on the Springfield *Union*, he became a special writer for the Cleveland *Plain Dealer* in 1919, managing editor in 1920 and editor in 1933. He was president of the American Society of Newspaper Editors in 1933 and 1934, and a member of the Code Authority of the Daily Newspaper Business under the N. R. A. He was a member of the highly important Special Committee on Cooperation between the Press, Radio, and Bar, Created at the instance of the American Bar Association in 1936.

An innovation in the program will be a breakfast on Monday, July 25th, in honor of the State Chairmen. This breakfast is being given by the Council, as an expression of appreciation for the effective work done this year by the State Chairmen.

Election returns this year will be announced as soon as the ballots are counted. This departure from last year is being made in aid of A. Pratt Kesler, who again is to serve as Chairman of the Elections Commit-

tee, and who last year succeeded in resisting the assaults of the curious from 8 p. m. to 8 a. m. election night only by almost superhuman efforts. Induction of the newly elected officers and Council will take place at a luncheon on Wednesday, July 27th.

Serving on the Program Committee with Mr. Foulis, Chairman, are Earl F. Morris of Columbus, Ohio, and James Gleason of Cleveland, Ohio.

Chairman Vernon has announced that Philip H. Lewis of Topeka, Kansas and Howard Cockrill of Little Rock, Arkansas, will be Chairmen of the Rules and Resolutions Committees respectively. Mr. Cockrill urges all persons intending to submit resolutions at Cleveland to send five copies of the resolutions to him. Resolutions submitted in advance can be given greater attention than if not presented until the open hearings of the Resolutions Committee at Cleveland. Mr. Cockrill's address is 825 Pyramid Building, Little Rock, Arkansas.

* *

The Executive Council, meeting in Washington on May 9:

1. Approved the Cleveland program.
2. Agreed to accede to the request of the Board of Governors that the Junior Bar Conference undertake a program to bring the Conference, the American Bar Association and state and local bar associations in closer relation with law school students. Chairman Vernon appointed Frank Eckdall, Chairman, and Grant Cooper and Earl Morris as a Council subcommittee to prepare a plan of action, to be submitted to the Conference at Cleveland.
3. Authorized the appointment of a subcommittee of the Council to study the need of a standing Conference committee on the Bill of Rights. Lewis Powell, Joseph Harrison and the Secretary of the Conference were selected for this subcommittee.
4. Accepted, at the suggestion of Frank Brockus of Kansas City, a proposal that the Conference members do investigating work for the National Conference of Bar Examiners, the fees to be paid into the Conference treasury.
5. Referred to the Committee on State Junior Bar Sections a proposed amendment to the Conference By-laws providing for "state units" of the Conference.
6. Were entertained at luncheon by District of Columbia Conference members.

* *

Thorough and able analysis of the Junior Bar movement and its accomplishments was made by Chairman Weston Vernon, Jr., in his address as a principal speaker at the Florida State Bar Convention on May 6.

Stating that "one of the most outstanding developments in the profession within recent years is the enlistment in the work of the organized bar of large groups of energetic, able and interested young men," the Chairman stressed the value to the profession and the community of the Conference Public Information and American Citizenship programs.

"In a day when persons of responsibility have publicly accused lawyers of blocking progress," he said, "we are in need of some means of presenting fairly to the public the place of the lawyer in society, the ideals of his profession, the true functions of the Courts and the importance of preserving all that is good in our basic law."

"The Junior Bar Conference now has enlisted more than 1000 speakers throughout the country who are prepared to make their best efforts to inspire some interest on the part of citizens in their form of government, help them to realize the necessity of exercising the privileges they now enjoy of governing themselves, and attempt to get them to realize that only by keeping our essential liberties can we provide security that is really secure."

"In time, the young lawyers of the country," he said, "can be built into an organization to supply the need for presenting to the people the true picture of affairs pertaining to matters within the particular province of lawyers."

Mr. Vernon urged bar associations to take a deeper interest in law students. "Young and old lawyers alike," he said, "must be prepared actively to interest themselves in seeing that the abilities of the student are directed into branches of the law where he can be useful when admitted, and to foster in the newly admitted lawyer the feeling of brotherhood which should prevail among members of the profession."

* *

Harold B. Wahl, dynamic Vice-Chairman of the Conference, a leader in the organization of the Junior Section of the Florida State Bar, and formerly its secretary, was elected Chairman of the Section at the annual meeting in May.

* *

Greater gains in Conference membership are being made this year than in earlier years, according to reports from headquarters. The 1936-7 total was probably passed by May 31. Kansas, from which Membership Chairman Robert M. Clark directs the campaign, was high in applications in April, with Illinois a close second.

HONORABLE E. H. COLEMAN, K. C.
Under-Secretary of State for Canada.
He will address the Association on Friday.

SIXTY-FIRST ANNUAL MEETING TO HAVE CONSTRUCTIVE PROGRAM

Significant Phases of Administration of Justice to Receive Attention—Sessions of Assembly and House of Delegates Promise Plenty of Action—Report of Section on Judicial Administration, Making Important Recommendations, to Be One of High Lights of Meeting—Novel and Important Feature in Form of Legal Institute to Appear on Program for First Time—Unusual List of Distinguished Speakers Who Will Address the Meeting on Various Occasions—Federal Rules of Civil Procedure to Be Subject of Addresses by Experts, Preceding Regular Sessions of Association—Section Programs Unusually Full and Interesting to Practicing Lawyers—Open Meetings of Certain Committees to Be Held—Tentative Program of Assembly and House—Entertainment, etc.

Tentative Program

MONDAY, JULY 25, 10:00 A. M.
Music Hall, Cleveland Auditorium
THE ASSEMBLY
The President, Presiding

Call to Order.
Address of Welcome.
Response by George Maurice Morris, Chairman of House of Delegates.
Presentation of Memorial to Hon. Frank B. Kellogg.
Presentation of Memorial to Hon. Newton D. Baker.
Annual Address of the President of the Association.
Award of the American Bar Association Medal.
Opportunity for the offering of resolutions pursuant to Article IV, Section 2 of the Constitution. (Resolutions will be referred, without debate at this time, to the Resolutions Committee for hearing and later report.)
Announcement by the Secretary as to the States, if any, in which a vacancy exists in the office of State Delegate and in the office of Assembly Delegate.
Election of Assembly Delegates to fill vacancies.
Adjournment.
(Meetings of members present from states in which a vacancy exists in the office of State Delegate will be held immediately following adjournment, to fill such vacancies.)

MONDAY, JULY 25, 2:00 P. M.
Ball Room, Cleveland Auditorium
THE HOUSE OF DELEGATES
The President, presiding

Roll Call.
Report of the Committee on Credentials and Admissions, W. W. Evans, Chairman, State Bar Association Delegate from New Jersey.
Approval of the Record.
Statement of the Chairman of the House of Delegates, George Maurice Morris, Washington, D. C.
Report of the Committee on Rules and Calendar, Guy Richards Crump, Chairman, State Delegate from California.
Report of the Secretary, Harry S. Knight.
Report of the Treasurer, John H. Voorhees.
Report of the Board of Governors to the House of Delegates, Harry S. Knight, Secretary.
Offering of Resolutions for Reference to the Committee on Draft.
Reports of Committees:
Admiralty and Maritime Law.
Aeronautical Law.
American Citizenship.
Commerce.
Communications.
State Legislation.
Amendments and Legislation relating to Child Labor.
Judicial Salaries.
Judicial Selection and Tenure.

MONDAY, JULY 25, 7:00 P. M.
Statler Hotel
DINNER OF THE ASSOCIATION

Under the Auspices of the Section of Judicial Administration and the National Conference of Judicial Councils.
Hon. John J. Parker, Presiding
Speakers:
Hon. Stanley F. Reed, Associate Justice of the Supreme Court of the United States.
Hon. Homer S. Cummings, The Attorney General of the United States.
Hon. William H. Grimball, Judge of the Circuit Court, Charleston, S. C.
10:00 P. M.
Reception by the President of the Association to members and guests. Dancing.

WEDNESDAY, JULY 27, 10:00 A. M.
Music Hall, Cleveland Auditorium
THE ASSEMBLY
The President, Presiding

Nomination and election (by ballot) of five Assembly Delegates to the House of Delegates.
Statement concerning the work of the American Law Institute, by Hon. Joseph C. Hutcheson, Jr., Judge of the Circuit Court of Appeals for the Fifth

Circuit and member of the Council of the American Law Institute.

Report by Hon. John J. Parker on the accomplishments of the Section of Judicial Administration, and discussion of the Section Committee Reports by the respective Chairmen.

Report by the Chairman of the House of Delegates (or the Secretary) as to matters requiring action by the Assembly.

WEDNESDAY, JULY 27, 2:00 P. M.

Ball Room, Cleveland Auditorium

THE HOUSE OF DELEGATES

The Chairman, Presiding

Roll Call.
Reading and Approval of the Record.
Unfinished Business.
Reports of Committees:
- Commercial Law and Bankruptcy.
- Federal Taxation.
- Securities Laws and Regulations.
- Customs Law.
- Jurisprudence and Law Reform.
- Administrative Law.
- Proposals Affecting the Supreme Court and Other Courts of the United States.
- Labor, Employment and Social Security.
- Facilities of the Law Library of Congress.
- To Further the Acquisition of Portraits of Former Associate Justices of the Supreme Court of the United States.
- Ways and Means.

Report of the Section of Judicial Administration.

WEDNESDAY, JULY 27, 8:30 P. M.

Music Hall, Cleveland Auditorium

THE ASSEMBLY

The President, Presiding

Address by The Right Hon. Lord Macmillan.

THURSDAY, JULY 28, 10:00 A. M.

THE ASSEMBLY

The President, Presiding

Presentation of Prize Award for 1938 Ross Bequest Essay to Albert E. Stephan, Portland, Oregon; address by Mr. Stephan.

Reports of Committees:
- Cooperation between the Press, Radio and Bar as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings.
- Duplication of Legal Publications.
- Resolutions.

THURSDAY, JULY 28, 2:00 P. M.

Ball Room, Cleveland Auditorium

THE HOUSE OF DELEGATES

The Chairman, Presiding

Roll Call.
Reading and Approval of the Record.
Unfinished Business.

Report to the House of Delegates of Resolutions Adopted by the Assembly for Action by the House of Delegates.

Consideration of Assembly Resolutions.

Reports of Committees:
- Legal Aid Work.
- Legal Clinics.
- Economic Condition of the Bar.
- Professional Ethics and Grievances.
- Unauthorized Practice of the Law.
- Law Lists.
- Survey of Work of Sections and Committees.
- Noteworthy Changes in Statute Law.

Reports of Sections:
- Junior Bar Conference.
- Legal Education and Admissions to the Bar.
- Municipal Law.

THURSDAY, JULY 28, 7:30 P. M.

Statler Hotel

ANNUAL DINNER

The President, Presiding

Speakers:

Hon. Owen J. Roberts, Associate Justice of the Supreme Court of the United States.

Mr. Leonard W. Brockington, K. C., Winnipeg, Manitoba, Canada.

Professor W. Barton Leach, Harvard Law School, Cambridge, Massachusetts.

FRIDAY, JULY 29, 9:00 A. M.

Ball Room, Cleveland Auditorium

THE HOUSE OF DELEGATES

The Chairman, Presiding

Roll Call.
Reading and Approval of the Record.
Unfinished Business.
Reports of Sections:
- Bar Organization Activities.
- Criminal Law.
- Insurance Law.
- International and Comparative Law.
- Mineral Law.
- National Conference of Commissioners on Uniform State Laws.
- Patent, Trade-Mark and Copyright Law.
- Public Utility Law.
- Real Property, Probate and Trust Law.

Presentation of any matters which any State or Local Bar Association or any affiliated organization of the legal profession wishes to bring before the House of Delegates.

Presentation of any matters which any Section or Standing or Special Committee of the Association wishes to bring before the House of Delegates.

Report of the Committee on Hearings, Francis P. Fleming, Chairman, State Delegate from Florida.,

Report of the Committee on Draft, Carl V. Essery, Chairman, State Bar Association Delegate from Michigan.

Report of the Board of Elections, Hon. Edward T. Fairchild, Chairman.

Statement of Certification of Nominations for Officers and Members of the Board of Governors, Harry S. Knight, Secretary.

Election of Officers and Members of the Board of Governors.

FRIDAY, JULY 29, 12:30 P. M.

Cleveland Hotel

ASSOCIATION LUNCHEON

The President, Presiding

Address by Mr. E. H. Coleman, K. C., the Under-Secretary of State for Canada.

Presentation of newly elected officers and members of the Board of Governors.

Informal Address by Incoming President.

2:00 P. M.

Music Hall, Cleveland Auditorium

THE ASSEMBLY

The President, Presiding

Report by the Chairman of the House of Delegates as to the Action of the House upon Resolutions adopted by the Assembly.

Action by the Assembly upon resolutions adopted

by the Assembly, but disapproved and modified by the House.

Unfinished Business.

New Business.

Adjournment.

At adjournment of Assembly—

Ball Room, Cleveland Auditorium

THE HOUSE OF DELEGATES

The Chairman, Presiding

Roll Call.

Report of the Committee on Credentials and Admissions with respect to newly elected Assembly Delegates, W. W. Evans, Chairman, State Bar Association Delegate from New Jersey.

Reading and Approval of the Record.

Unfinished Business.

New Business.

Adjournment.

LEGAL INSTITUTE*

Under the auspices of the Section of Legal Education and Admissions to the Bar

Little Theatre, Cleveland Auditorium

Wednesday, July 27, 2:00 P. M.

Subject: "The Drafting of Wills and Trusts: The Use of Powers of Appointment and the Avoidance of the Rule against Perpetuities."

Lecturer: Prof. W. Barton Leach, Harvard Law School, Reporter on Real Property for the American Law Institute.

FIRST LECTURE

"Powers of Appointment and the Instruments which Create and Exercise them; the usefulness of Powers of Appointment in Giving Flexibility to a Testamentary Scheme and in Minimizing Estate Taxes; Suggestions as to Drafting Powers and Instruments of Appointment."

Thursday, July 28, 2:00 P. M.

SECOND LECTURE

"The Rule against Perpetuities; Elements of the Rule; Types of Situations in which the Rule Has Unexpected Application; Methods of Drafting Instruments to avoid the Pitfalls of the Rule."

Friday, July 29, 9:30 A. M.

THIRD LECTURE

"The Application of the Rule against Perpetuities to Class Gifts and to powers of appointment; Questions of Construction related to the Rule; Whether and How the Rule applies to Options to Purchase; Convertible Bonds; Insurance Trusts; Powers of Sale in Trustees."

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*Prof. Leach will lecture at all sessions; Admission will be by tickets which will be available without charge at the Registration desk in General Headquarters in the Cleveland Hotel.

COMMITTEE ON FEDERAL TAXATION

Cleveland Hotel

Tuesday, July 26, 12:30 P. M.

Luncheon and Federal Tax Clinic, Robert N. Miller, Chairman, Presiding. (Speaker and subject to be announced later.)

2:30 P. M.

Tax Clinic, Continued.

(Names of speakers and subjects for discussion will be announced later.)

OPEN MEETING OF THE STANDING COMMITTEE ON UNAUTHORIZED PRACTICE OF THE LAW

Wednesday, July 27, 2 P. M.

Stanley B. Houck, Chairman, Presiding

The following subjects will be discussed:

1. Ways and means of making the Associate and Advisory Committee function more effectively.

2. General discussion of Unauthorized Practice of the Law by laymen, publishers' services in special fields of the law, and publishers and distributors of legal books, legal forms, etc.

3. Addresses on recent developments in and furtherance of the cooperative relationship between the Bar and Trust Companies.

Names and subjects to be announced later.

4. Discussion of ways and means of furthering "Public Relations" between the Bar and lay groups in the course of suppression of the unauthorized practice of the law.

5. General discussion of any and all matters which may be presented during the meeting.

OPEN FORUM ON PENDING FEDERAL LEGISLATION INVOLVING REORGANIZATIONS AND SECURITIES

Cleveland Auditorium

Monday, July 25, 2 P. M.

Tuesday, July 26, 10 A. M.

Under Auspices of Sub-committee of Board of Governors in cooperation with Committees on Administrative Law, Commercial Law and Bankruptcy, Securities Laws and Regulations and the Section of Municipal Law.

A representative of the Securities and Exchange Commission will discuss the underlying purposes, philosophy and value of the Chandler Bill, the Lea Bill, and the Barkley Bill.

A representative of the Committee on Administrative Law will discuss the Administrative Laws aspects of the Lea and Barkley Bills.

A representative of the Committee on Commercial Law and Bankruptcy will discuss the effects of the three bills on reorganizations through bankruptcy and court procedure.

Representatives of the Committee of Securities Law and Regulations will discuss the Barclay Bill and the effect of the Lea Bill on Non-Judicial Reorganizations.

A speaker representing the Municipal Law Section will discuss the effect of the Lea Bill on reorganizations and municipal securities.

SECTION OF BAR ORGANIZATION ACTIVITIES

SECOND ANNUAL MEETING

Cleveland Auditorium

Tuesday, July 26, 1938

Carl V. Essery, Chairman, presiding

FIRST SESSION—9:30 A. M.

Report of Chairman.

Appointment of Nominating Committee.

Roll Call.

Report of Committee on Local Bar Association Administration—David A. Frank, Dallas, Texas, Chairman.

Address—"Section Organization in Local Bar Associations," Ben O. Shepherd (President, Detroit Bar Association).

General Discussion of Local Bar Association Problems:

The Amount and Collection of Dues;
Time and Place of Meetings;
Speakers;
Minimum Fee Schedules.

Report of Committee on Voluntary State Bar Association Administration.—J. Gilbert Hardgrove, Milwaukee, Wis., Chairman.

Report of Committee on Coordination of State and Local Associations.—Forrest C. Donnell, St. Louis, Missouri, Chairman.

Address—"What the American Bar Association Can Do to Aid Local Bar Associations," Forest G. Moorhead, Beaver, Pa., former President of Pennsylvania Bar Association.

Address—"What the American Bar Association Can Do to Aid State Bar Associations," W. Wallace Fry, Mexico, Mo., President, Missouri State Bar Association.

Address—"What Local and State Bar Associations Can Do to Aid the American Bar Association," William L. Ransom, New York City, former President of American Bar Association.

General Discussion of Questions bearing on Cooperation between Bar Associations. (Questions to be announced later.)

Report of Committee on Future Program of Work for the Section—Raymer F. Maguire, Orlando, Florida, Chairman.

General Discussion of Report of Committee.

SECOND SESSION—2:00 P. M.

Report of Committee on Administration of Integrated State Bars—Roscoe O. Bonisteel, Ann Arbor, Mich., Chairman.

Symposium—"How to Obtain Integration:"

Carl B. Rix, Milwaukee, Wis., Chairman of Committee on State Bar Integration.

State Bar Integration.

Burt J. Thompson, Forest City, Iowa.

James W. Gordon, Richmond, Va.

Romney Spring, Boston, Mass.

Harvey M. Johnson, Omaha, Neb.

General Discussion of Problems Relating to the Integrated Bar.

Report of Committee on Public Relations—Mitchell Dawson, Chicago, Illinois, Chairman.

Address—"What an Editor Thinks of Lawyers—N. R. Howard, Editor of the *Cleveland News*.

General Discussion of Questions bearing on Public Relations.

Report of Committee on Judicial Councils—Silas A. Harris, Columbus, Ohio, Chairman.

Address—"The Function of Bar Organizations in the Development of Judicial Administration." Arthur T. Vanderbilt, President of American Bar Association.

Report of Committee on Legislative Contacts—Frank E. Tyler, Kansas City, Missouri, Chairman.

Report of Committee on Fees and Schedules of Charges—Henry C. Warner, Dixon, Illinois, Chairman.

Report of Committee on Publications—J. L. W. Henney, Columbus, Ohio, Chairman.

Election of Officers.

Unfinished Business.

SECTION OF CRIMINAL LAW

Ball Room, Statler Hotel

Tuesday, July 26, 10:00 A. M.

Rollin M. Perkins, Chairman, Presiding

Report of Chairman.

Report of Secretary.

Appointment of Nominating Committee.

Reports of Committees on:

Cooperation with American Prison Association.

Cooperation with Council of State Governments.

Cooperation with International Association of Chiefs of Police.

Criminal Law Enforcement.

Criminal Procedure.

Current Developments.

Education and Practice.

"Demonstrations of Scientific Crime Detection," by Professor Leonarde Keeler, of the Scientific Crime Detection Laboratory of Northwestern University School of Law.

Address, "Juvenile Delinquency," by Sanford Bates.

8:00 P. M.

Lattice Room, Statler Hotel

Annual Dinner. (Program to be announced later.)

Wednesday, July 27, 2:00 P. M.

Ball Room, Statler Hotel

Reports of Committees on:

Medico-Legal Problems.

Personnel in Criminal Law Enforcement.

Psychiatric Jurisprudence.

State and Local Bar Associations.

Special Committee on Firearms Legislation.

Report of Nominating Committee.

Election of Officers and Members of Council.

SECTION OF INSURANCE LAW

Monday, July 25, 1938

Statler Hotel

Howard D. Brown, Chairman, Presiding

2:00 P. M.

Address of Welcome, by Lawrence Jeffries, Department of Insurance, Columbus, Ohio.

Response by Howard D. Brown, Chairman, Section of Insurance Law.

Report of Secretary, Howard C. Spencer.

Appointment of Nominating Committee.

2:45 P. M.

Reports of Committees:

Membership, Charles W. Morris, Louisville, Ky., Chairman.

Unauthorized Insurance Companies, Henry S. Moser, Chicago, Ill., Chairman.

DISTINGUISHED SPEAKERS WHO WILL ADDRESS ANNUAL MEETING AT CLEVELAND

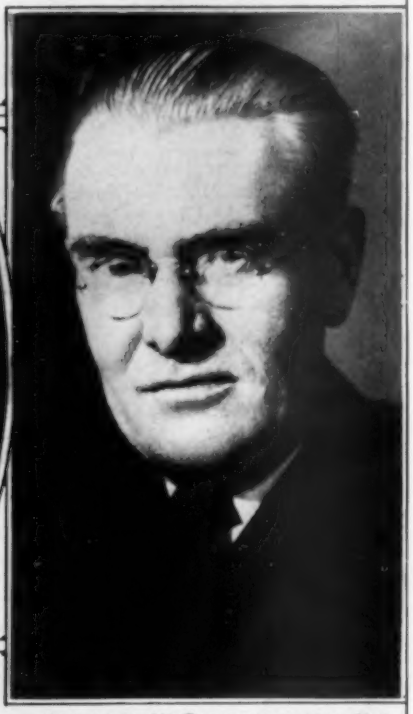
U.S. Attorney General
HOMER S. CUMMINGS

RT. HON. LORD MACMILLAN

Justice OWEN J. ROBERTS
of U.S. Supreme Court

Professor W. BARTON LEACH
of Harvard Law School

Justice STANLEY REED
of U.S. Supreme Court



LEONARD W. BROCKINGTON K.C.
of the Winnipeg, Canada, Bar

Life Insurance Law, John F. Handy, Springfield, Mass., Chairman.

Fire Insurance Law, Chase M. Smith, Chicago, Ill., Chairman.

Health and Accident Insurance Law, Frank E. Spain, Birmingham, Ala., Chairman.

Automobile Insurance Law, Royce G. Rowe, Chicago, Ill., Chairman.

Fraternal Insurance Law, Arthur W. Fulton, Chicago, Ill., Chairman.

Marine and Inland Marine Insurance Law, James W. Ryan, New York City, Chairman.

Workmen's Compensation and Employers' Liability Insurance Law, Raymond N. Caverly, New York City, Chairman.

Prospective Legislation, Lewis Benson, Huron, S. D., Chairman.

3:45 P. M.

"The Lawyer and the Life Underwriter," by Roger B. Hull, General Counsel of the National Association of Life Underwriters, New York City.

"The Law of Marine and Inland Marine Insurance," by James W. Ryan, New York City.

"Protection and Indemnity Insurance," by Samuel D. Macomb, New York City.

"Pre-Trial Procedure in Insurance Cases," by Hon. Joseph A. Moynihan, Judge Circuit Court, Detroit, Mich.

Tuesday, July 26

9:30 A. M.

Reports of Committees:

Fidelity and Surety Insurance Law, J. Harry Schisler, Baltimore, Md., Chairman.

Casualty Insurance Law, Millard B. Kennedy, Chicago, Ill., Chairman.

Qualification and Regulation of Insurance Companies, Professor Edwin W. Patterson, New York City, Chairman.

Lay Insurance Adjusters, E. Smythe Gambrell, Atlanta, Ga., Chairman.

10:00 A. M.

"The Federal Motor Carrier Act." by Hon. Joseph B. Eastman, Interstate Commerce Commission, Washington, D. C.

"Declaratory Judgments and Insurance Litigation," by Edwin M. Borchard, Professor of International Law, Yale University.

"The Future Development of the Automobile Policy," by E. W. Sawyer, Boston, Mass.

"Defenses Based Upon Concealment, Misrepresentation or Fraud under Standard Fire Insurance Policy," by Charles W. Sellers, Guardian Building, Cleveland, Ohio.

ROUND TABLE CONFERENCES

2:00 P. M.

Six Round Table Conferences will be held in rooms to be assigned at the Statler Hotel. The specific program of each Conference follows:

Round Table I

FIDELITY AND SURETY INSURANCE LAW: J. Harry Schisler, Chairman, Presiding.

"Case Law Developed from Bankers' and Brokers' Blanket Bonds," paper by Henry W. Nichols, New York City.

"Equitable Remedies in re Contractors' Public Works Bonds," paper by Edward H. Cushman of Philadelphia, Pa.

Discussion.

Round Table II

CASUALTY INSURANCE LAW: Millard B. Kennedy, Chairman, Presiding.

"Liability of Owners, Landlords and Tenants to Invitees, Licensees and Trespassers," by David C. Haynes, Youngstown, Ohio.

"Conflict in Laws of Various States Regarding Negligence Resulting in Death," by Wendell D. Allen, Baltimore, Md.

"Claims or Judgments against Insured in Excess of Policy Limits," by Henry Moser, Chicago, Illinois.

"Riot and Sit Down Strike Liability," by Milo H. Crawford, Detroit, Mich.

Discussion.

Round Table III

LIFE INSURANCE LAW
HEALTH AND ACCIDENT INSURANCE LAW
FRATERNAL INSURANCE LAW
} Committees will hold a joint session

Life Insurance Law

"Aviation Hazard as Affecting Life Insurance Contracts," by Rowland H. Long, New York City.

"Taxation of Life Insurance Companies Under State Laws," by Robert L. Hogg, New York City.

Discussion.

Fraternal Insurance Law

"The Law of Assignment as Related to Fraternal Benefit Certificates," paper by Edmund L. Craig, Evansville, Ind.

Discussion lead by Richard F. Allen, Topeka, Kans.

Health and Accident Insurance Law

"Amount in Controversy," by Ivan Robinette, Phoenix, Ariz.

Discussion by J. Mitchell Cockrill, Little Rock, Ark.

"Expert Testimony," by F. Roland Allaben, Grand Rapids, Mich.

Discussion by C. H. Gover, Charlotte, N. C.

Round Table IV

FIRE INSURANCE LAW: Chase M. Smith, Chairman, Presiding.

"Sole and Unconditional Ownership Clause in Standard Fire Insurance Policy," by Arthur E. Benson, Counsel, Fire Association of Philadelphia, Pa.

"Review of Fire Insurance Decisions of the Year," by Burke G. Slaymaker, Indianapolis, Ind.

"Annotation of Fire Insurance Policy," report and discussion by Chase M. Smith.

Round Table V

WORKMEN'S COMPENSATION AND EMPLOYERS' LIABILITY INSURANCE: Raymond N. Caverly, Chairman, Presiding.

Papers on:

"Administration of Compensation Laws," by Edward J. Boleman, Indianapolis, Ind., and John J. Carroll, member of Industrial Accident Board of New York.

"Occupational Disease," by Thomas N. Bartlett, Manager Claim Dept., Maryland Casualty Company, Baltimore, Md., and Albert E. Meder, Detroit, Mich.

Round Table VI

MARINE AND INLAND MARINE INSURANCE: James W. Ryan, Chairman, Presiding.

"Inland Marine Insurance," by Earl Appleman, New York City.

"Collision Claims in Marine Insurance," by Leonard J. Matteson, New York City.

"Deviation as Defined by the Courts Under Marine Insurance Policies," by Henry P. Dart, Jr., New Orleans, La.

"Status of Seamen Working on Board Vessels Which Are Out of Commission," by Carl V. Essery, Detroit, Mich.

"Recent Developments in the Laws and Customs of Marine Insurance," by Joseph W. Henderson, Philadelphia, Pa.

"Inland Marine Insurance Problems in the Eastern States," by Thomas Watters, Jr., Washington, D. C.

"Marine and Inland Marine Insurance Experience and Problems on the Great Lakes and in the Middle Western States," by L. H. Kerr, Chicago, Ill.

7:00 P. M.

Statler Hotel

ANNUAL DINNER—Floor Show

Wednesday, July 27

2:00 P. M.

"What the Government Has Done, and is Doing, to Further Adequate Insurance and Security for Its Citizens and Their Property," by Hon. Joseph B. Keenan, Assistant to the Attorney General of the United States, Washington, D. C.

"Equitable Relief from Fraud in the Procurement of Insurance," by Frank E. Spain, Birmingham, Ala.

"Effect of Settlement Policy of Insurance Companies on Lawyers' Income," by Hugh D. Combs, Vice-President, United States Fidelity & Guarantee Company, Baltimore, Md.

GENERAL DISCUSSION BY MEMBERS OF THE SECTION.

REPORT OF NOMINATING COMMITTEE.

ELECTION OF OFFICERS.

SECTION OF INTERNATIONAL AND COMPARATIVE LAW

Cleveland Auditorium—Room "C"

Monday, July 25, 2:00 P. M.

John P. Bullington, Chairman, Presiding

Report of Chairman.

DIVISION OF COMPARATIVE LAW

Guerra Everett, Washington, D. C., Division Director, Presiding.

Symposium discussion:

"Procuring of Evidence Abroad," Raymond T. Heilpern, New York City.

To be followed by discussion from the floor.

Reports of Committees:

Arrangements for Washington Meeting, William R. Vallance, Washington, D. C., Chairman.

Teaching of International and Comparative Law, Howard S. LeRoy, Washington, D. C., Chairman.

Membership, James Oliver Murdock, Washington, D. C., Chairman.

Appointment of Nominating Committee.

Music Hall

Tuesday, July 26, 10:00 A. M.

Reports of Committees:

Powers of Attorney in Latin American Countries, David E. Grant, New York City, Chairman.

Military and Naval Law, Col. Hugh C. Smith, Washington, D. C., Chairman.

International Double Taxation, Mitchell B. Carroll, New York City, Chairman.

DIVISION OF INTERNATIONAL LAW

Symposium discussion:

"The Mexican Situation and Protection of American Property Abroad," Frederic R. Coudert, New York City.

General discussion led by William R. Vallance, Washington, D. C.

To be followed by discussion from the floor.

Reports of Committees:

International Law in the Courts of the United States, Edgar Turlington, Washington, D. C., Chairman.

Pacific Settlement of International Disputes and Current Development of International Law, James Brown Scott, Washington, D. C., Chairman.

2:00 P. M.

Reports of Committees:

Publications, Louis G. Caldwell, Washington, D. C., Chairman.

Symposium discussion:

"The Neutrality Problem," by Edwin M. Borchard, Yale Law School, New Haven, Connecticut.

General discussion led by James W. Ryan, New York City.

To be followed by discussion from the floor.

Room "C"

Wednesday, July 27, 2:00 P. M.

Symposium discussion:

"Developments and Trends in Foreign Expropriation Laws," Henry P. Crawford, Washington, D. C.

General discussion led by the Chairman.

To be followed by discussion from the floor.

Reports of Committees:

Restatement of International Law, William S. Culbertson, Washington, D. C., Chairman.

Revision and Codification of United States Nationality Laws, Henry F. Butler, Washington, D. C., Chairman.

Miscellaneous Unfinished Business.

Report of the Nominating Committee.

Election of Officers.

SECTION OF JUDICIAL ADMINISTRATION

Little Theatre—Cleveland Auditorium

Judge John J. Parker, Chairman, Presiding

Monday, July 25, 2:30 P. M.

Report of Chairman and Council of Section, Judge John J. Parker, Charlotte, N. C.

Report of Committee on General Aspects of Judicial Administration, Judge Edward R. Finch, New York City, Chairman.

Open forum discussion of this report.

Report of Committee on Jury Selection, Judge John P. Dempsey, Cleveland, Ohio, Chairman.

Open forum discussion of this report.

Report of Committee on Pre-Trial Practice, Judge Joseph A. Moynihan, Detroit, Michigan, Chairman.

Open forum discussion of this report.

Report of Committee on Trial Practice, Judge W. Calvin Chesnut, Baltimore, Maryland, Chairman.

Open forum discussion of this report.

General Business.

7:00 P. M.

Statler Hotel

DINNER OF THE ASSOCIATION

Under the Auspices of the Section of Judicial Administration and the National Conference of Judicial Councils.

Hon. John J. Parker, Presiding

Speakers:

Hon. Stanley F. Reed, Associate Justice of the Supreme Court of the United States.

Hon. Homer S. Cummings, The Attorney General of the United States.

Hon. William H. Grimball, Judge of the Circuit Court, Charleston, S. C.

Tuesday, July 26, 10:00 A. M.

Little Theatre Auditorium

Frank W. Grinnell, Chairman of National Conference of Judicial Councils, presiding.

Address—Chief Justice John W. Kephart, of the Supreme Court of Pennsylvania.

Report of Committee on Appellate Procedure Prof. Edson R. Sunderland, Ann Arbor, Michigan, Chairman.

Open forum discussion of this report.

Report of Committee on Law of Evidence, Dean John H. Wigmore, Chicago, Illinois, Chairman.

Open forum discussion of this report.

Report of Committee on Administrative Agencies and Tribunals, Ralph M. Hoyt, Milwaukee, Wis., Chairman.

Open forum discussion of this report.

General Business.

Election of Officers for ensuing year.

Note: All members of the Association, whether members of the Section or not, are invited to attend the Section meetings. Reports of chairmen of committees will be limited in length to from ten to fifteen minutes, not exceeding fifteen minutes in any case. Following each report an open forum discussion will be had so that the views of those present with respect to the proposals of the committees may be registered, and discussion from the floor is invited. Time allotted for open forum discussion of each report is limited to twenty minutes, with a three minute limit on speeches.

JUNIOR BAR CONFERENCE

Cleveland Hotel

Sunday, July 24, 9:00 A. M.

Meeting of Officers and Council.

2:00 P. M.

FIRST GENERAL SESSION

Harold B. Wahl, Jacksonville, Florida, Vice-Chairman, Presiding

Address of Welcome, James R. Garfield, Cleveland, Ohio.

Response, Joseph D. Stecher, Toledo, Ohio, Past Chairman of the Conference.

Address by Paul Bellamy, Editor of the *Cleveland Plain Dealer*.

Introduction and Remarks from President Vanderbilt.

Report of the Chairman, Weston Vernon, Jr., New York City.

Report of the Secretary, Paul F. Hannah, Washington, D. C.

Report of the Committee on Rules, Philip H. Lewis, Topeka, Kans., Chairman.

Report of the Director of Public Information, Milford Springer, Washington, D. C., Director.

Report of Activities Committee, Donald B. Hatmaker, Chicago, Ill., Chairman.

Announcement of Personnel of Nominating Committee.

Report of Committee on Elections, A. Pratt Kesler, Salt Lake City, Utah, Chairman.

Adjournment at 4:30 P. M.

Monday, July 25, 8:00 A. M.

Breakfast by Council Members for State Chairmen, Hotel Cleveland.

9:00 A. M.

Open hearings by Resolutions Committee—Private Dining Room No. 31, Cleveland Hotel.

2:00 P. M.

Open hearings by Resolutions Committee, Private Dining Room No. 31, Cleveland Hotel.

4:00 P. M.

Meeting of Nominating Committee to receive nominations, Private Dining Room 29, Cleveland Hotel.

Tuesday, July 26, 9:30 A. M.

SECOND GENERAL SESSION

Weston Vernon, Jr., Chairman, Presiding

Reports of Standing Committees:

- Membership, Robert M. Clark, Topeka, Kans., Chairman.
- Restatement of the Law, H. J. Cohen, Boston, Massachusetts, Chairman.
- Unauthorized Practice of the Law, Julius Sklar, Camden, New Jersey, Chairman.
- State Junior Bar Sections, Francis L. Cross, San Francisco, California, Chairman.
- Economic Survey, LaVergne Guinn, Dallas, Tex., Chairman.
- Publications, Minier Sargent, Chicago, Ill., Chairman.
- Legislative Drafting, John H. Caruthers, St. Louis, Missouri, Chairman.
- Reports, Julian B. Humphrey, New Orleans, La., Chairman.

Reports of Special Committees:

- Relations with Law Schools, Frank F. Eckdall, Emporia, Kansas, Chairman.
- Civil Liberties, Paul F. Hannah, Washington, D. C., Chairman.

Report of Resolutions Committee, H. Howard Cockrill, Little Rock, Ark., Chairman.

Open discussion of program of Conference for following year.

Report of Nominating Committee.

Nominations from the floor.

Adjournment at 12:00 Noon.

12:00 M. to 2:00 P. M.

Balloting by members for election of officers and council members for ensuing year.

2:00 P. M.

Meeting of Judges of Election to count ballots.

7:00 P. M.

Dinner Dance at the Country Club, Lander Road.

Wednesday, July 27, 12:30 P. M.

Luncheon at Mid-Day Club, Union Trust Bldg., Weston Vernon, Jr., Retiring Chairman, presiding.

Installation of new Officers.

Adjournment.

Meeting of newly elected Officers and Council.

SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR

Cleveland Hotel

Tuesday, July 26, 9:30 A. M.

Joint Session with the National Conference of Bar Examiners, R. G. Storey, Chairman of Section, presiding.

Report of Committee on Cooperation between Bar Associations, Law Schools and Boards of Legal Examiners, Alfred L. Bartlett, Chairman.

Topic for Discussion—"The Character Problem in the Bar Admission Process."

Speakers:

Walter M. W. Splawn, Washington, D. C., Chairman of the Interstate Commerce Commission.

Karl A. McCormick, Buffalo, N. Y., Proctor of the Bar of the Eighth Judicial District of New York.

William M. James, Chicago, Ill., Chairman of the Committee on Character and Fitness Examination of the National Conference of Bar Examiners.

2:00 P. M.

Address by the Chairman.

Report of the Adviser.

Appointment of Nominating Committee.

Address—"Some Convictions as to Legal Education," by Arthur T. Vanderbilt, President of the American Bar Association.

Address—"Legal Institutes I Have Known," by Walter L. Flory, of Cleveland, Ohio.

Address—"Practising Law Courses," by Charles A. Beardsley, of Oakland, California.

Three minute reports on Institutes, Practising Law Courses, and State Bar Activities in Advanced Legal Education.

Report of Nominating Committee.

Election of Officers.

SECTION OF MINERAL LAW

Cleveland Auditorium—Room "B"

Monday, July 25, 2:00 P. M.

James L. Shepherd, Jr., Chairman, Presiding

Report of the Chairman.

Approval of Minutes of Kansas City Meeting.

Disposition of Routine Matters.

Appointment of Nominating Committee.

Addresses:

"The Modern Theory and Practical Application of Statutes for the Conservation of Oil and Gas," by Professor Walter L. Summers, of the School of Law of the University of Illinois.

"Compulsory Pooling of Adjacent Tracts into Drilling Units to Conform to an Established Well-spacing Plan," by James A. Veasey, General Counsel and Vice-President of The Carter Oil Company, Tulsa, Okla.

Tuesday, July 26, 9:30 A. M.

Symposium Address:

"Recycling Gas, Repressuring Oil Sands, and Storing Gas in Depleted Fields as Conservation Measures."

Engineering aspects: J. H. Dunn, Production Engineer, Lone Star Gas Company, Dallas, Texas.

Legal aspects: C. C. Small, Amarillo, Texas, member of the Texas Senate.

2:00 P. M.

Addresses:

"The Bituminous Coal Act of 1937—the Difficulties Encountered in Bringing it into Effect, etc."—Robert W. Knox, General Counsel of the National Bituminous Coal Commission, Washington, D. C.

Walter F. Dodd, Chicago, Ill., will deal with other aspects of the subject as will additional speakers to be announced later.

SECTION OF MUNICIPAL LAW

Cleveland Hotel

Tuesday, July 26, 10:00 A. M.

Murray Seasongood, Chairman, presiding

Address of Welcome and brief address on "Matters of Local Government," by Hon. Harold H. Burton, Mayor of the City of Cleveland.

Report of Committee on Legal Problems of Municipal Housing and City Planning, Edward H. Foley, Jr., Chairman, of counsel of U. S. Treasury Department.

New York City Housing Authority, Maxwell H. Tretter, counsel to the Authority.

Municipal Housing Officials Association, Ernest J. Bohn, Chairman of Housing Committee, Cleveland City Council and officer of National Association of Housing Officials.

The United States Housing Authority, Leon H. Keyserling, General Counsel to the Authority.

An ex-mayor looks at Municipal Government, Neville Miller, Assistant to the President of Princeton University, ex-mayor of the City of Louisville, Ky.

12:45 P. M.

Section Luncheon

Municipal Government, Murray Seasongood.

2:30 P. M.

Reports of Committees:

Special Assessments on Real Property and Special Assessment Obligations, Henry P. Chandler, Chairman.

Improvement of Legal Procedure for Assessment, Levy and Collection of Municipal Taxes on Real Property, Robert C. Brown, Chairman.

Municipal Civil Service and Improvement of Government Personnel, Murray Seasongood, Chairman.

Address: Revising the Statutes of New Jersey—Frank H. Sommer, Dean of New York University, School of Law.

Reports of Committees:

Legal Remedies of Municipal Bondholders and Administrative Control of Municipal Reorganizations, Edward J. Dimock, Chairman.

Consolidation and Reorganization of City and County Government, Thomas H. Reed, Chairman.

Legal Problems of Financing Municipal Improvements by "Special Revenue" and "Authority" Obligations, Arnold Frye, Chairman.

Publications: "Legal Notes," C. W. Tooke, Chairman.

Report of Nominating Committee and Election of Officers.

Statement by New Chairman as to Budget and Committees for the new year.

Adjournment at 5:00 P. M.

SECTION OF PATENT, TRADE-MARK AND COPYRIGHT LAW

Directors Room—4th Floor, Union Trust Building

Bert M. Kent, Chairman, Presiding

Monday, July 25, 2:00 P. M.

Announcements.

Report by Chairman.

Reports of Committees.

Appointment of Committee to Nominate Officers and Members of Council.

Tuesday, July 26, 10:00 A. M.

Announcements.

Reports of Committees (Cont'd).

2:00 P. M.

Reports of Committees (Cont'd).

Report of Nominating Committee and Election of Officers and Members of Council.

Unfinished Business.
New Business.
Adjournment.

7:30 P. M.

Country Club (Lander Road)
Informal Dinner for Members, Ladies and Guests.

Wednesday, July 27

Morning and afternoon trips will be arranged so that Members and Guests may see some of the unique and outstanding industrial plants in Cleveland. Provisions for playing golf will also be made. Details will be announced at the opening session on Monday afternoon.

SECTION OF PUBLIC UTILITY LAW

Cleveland Auditorium

Tuesday, July 26, 10:00 A. M.

Walter Chandler, Chairman, presiding

Address of Chairman of the Section.

Address of Hon. William O. Douglas, Chairman of the Securities and Exchange Commission. (Subject to be announced later.)

Report of Special Committee on the Simplification of Holding Company Systems Under the Public Utility Holding Act, Hon. John J. Burns, of New York, Chairman.

Informal discussion of report.

2:00 P. M.

Address of Hon. Robert M. Cooper, of the Department of Justice, Washington, D. C., "Methods and Types of Control Now Utilized by Federal and Local Authorities."

Report of Standing Committee to Survey and Report on the Development During the Year in the Field of Public Utility Law, Walter P. Armstrong, of Memphis, Tenn., Chairman.

Informal discussion of Standing Committee's report.

7:30 P. M.

University Club

Annual Dinner for Members, Ladies, and Guests. Dancing.

Wednesday, July 27, 2:00 P. M.

Symposium on Problems of the American Railroads, including a discussion of Section 77 of the National Bankruptcy Act, and pending legislation for relief and reorganization of railroads. Led by Hon. Henry W. Anderson, of Richmond, Va.; Hon. Leslie Craven, of New York City; and Hon. Robert B. Tunstall, of Cleveland, Ohio.

Unfinished and New Business.

Election of Officers.

SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW

Monday, July 25, 12:00 M.

Annual Luncheon Meeting of Council of Section—Cleveland Hotel.

2:00 P. M.

Ball Room—Cleveland Hotel

General Meeting of Section—Opening Session; Nathan William MacChesney, Chairman, presiding.

Annual Address of Chairman: "Real Property—Its Political, Legal and Social Significance."

Address: Hon. Robert H. Jackson, Solicitor General of the United States. "The Application by Federal Courts of Local Law."

Statement by Director of Real Property Law Division, George E. Beers, Vice-Chairman, New Haven, Conn.

Statement by Director of Probate Law Division, W. M. Crook, Vice-Chairman, Beaumont, Texas.

Statement by Director of Trust Law Division, George G. Bogert, Vice-Chairman, Chicago, Ill.

Report by Secretary of Section James E. Rhodes, II, Hartford, Conn.

Reports of Section Committees:

Policy and Program, Gilbert T. Stephenson, Wilmington, Del., Chairman.

Public Relations, James E. Rhodes, II, Hartford, Conn., Chairman.

Cooperation of State and Local Bar Associations, R. G. Patton, Minneapolis, Minn., Chairman.

New Members for American Bar Association and Section, Eleanor S. Burr, Boston, Mass., Chairman.

Publications, George F. Anderson, Chicago, Ill., Chairman.

Forms and Relations with Lay Agencies, Robert F. Bingham, Cleveland, Ohio, Chairman.

Appointment of Nominating Committee.

Tuesday, July 26, 9:30 A. M.

Ball Room—Hollenden Hotel

Real Property Law Division; First Session; George E. Beers, New Haven, Conn., Vice-Chairman and Director of Division, presiding.

Statement by Director of Division.

Reports by Division Committees:

Standards for Abstracts of Title, H. L. Douglass, Oklahoma City, Okla., Chairman.

Standards for Title Opinions, Marion N. Chrestman, Dallas, Texas, Chairman.

Standards for Certificates of Title Under Torrens System, John deLaittre, Minneapolis, Minn., Chairman.

Standards for Title Insurance, James E. Rhodes, II, Chairman.

Improvement of Title Records, Edward D. Landels, San Francisco, Calif., Chairman.

Conveyancing in Compliance with Bankruptcy Act, Elmer M. Leesman, Chicago, Ill., Chairman.

Cypress Room—Hollenden Hotel

Probate Law Division; First Session; W. M. Crook, Beaumont, Texas, Vice-Chairman and Director of Division, presiding.

Statement by Director of Division.

"Rights, Powers and Duties of Foreign Executors, Administrators, Guardians and Conservators," Morton J. Barnard, Chicago, Ill.

Discussion.

Reports by Division Committees:

Conflict of Laws in Probate, Morton J. Barnard, Chicago, Ill., Chairman.

Wills, Mary F. Lathrop, Denver, Colo., Chairman.

Parlor "B"—Hollenden Hotel

Trust Law Division; First Session; George G. Bogert, Chicago, Ill., Vice-Chairman and Director of Division, presiding.

Statement by Director of Division.

"Is There a Field in the United States for the Individual Private Trustee?"—Leverett Saltonstall, Boston, Mass., and F. A. Carroll, Boston, Mass.

"Exculpatory Provisions of Personal Trust Instruments," Henry A. Shinn, Univ. of Georgia, Athens, Ga.

Comments:
J. Craig McLanahan, Baltimore, Maryland.
Charles C. Townsend, Philadelphia, Pa.

2:00 P. M.

Ball Room—Hollenden Hotel

Real Property Law Division; Second Session; George E. Beers, New Haven, Conn., Vice-Chairman and Director of Division, presiding.

Reports by Division Committees:

Suggested Changes in Major Substantive Real Property Principles, Merrill Isaac Schnebly, Univ. of Ill. Law School, Urbana, Ill., Chairman.

Improvements in Conveyancing Practice, W. Noble Carl, Houston, Texas, Chairman.

Federal Tax Liens, Roger D. Swain, Boston, Mass., Chairman.

Joint Committee with American Society of Civil Engineers, Dorr Viele, Cambridge, Mass., Chairman.

Building and Loan Association Financing, Henry P. Thomas, Alexandria, Va., Chairman.

Cypress Room—Hollenden Hotel

Probate Law Division; Second Session; W. M. Crook, Beaumont, Texas, Vice-Chairman and Director of Division, presiding.

"Origin and Growth of Probate Procedure," Hon. Albert J. DeLange, Houston, Texas.

Discussion.

"Duty of Executor or Administrator with Reference to an Infant's or Lunatic's Share in Proceeds of Sale of Ancestor's Estate in a Partition Proceeding, and the Effect of Death of Infant or Lunatic Intestate Without Issue," George C. Gertman, Washington, D. C.

Comments.

"Relation of Executors and Administrators to State and Federal Inheritance Taxes," G. A. Youngquist, Minneapolis, Minn.

Discussion.

Reports of Division Committees:

Origin and Growth of Probate Procedure, Albert J. DeLange, Houston, Texas, Chairman.

Executors and Administrators, George C. Gertman, Washington, D. C., Chairman.

Parlor "B"—Hollenden Hotel

Trust Law Division; Second Session; George G. Bogert, Chicago, Ill., Vice-Chairman and Director of Division, presiding.

"Legal Aspects of Common Trust Funds," Rolin Browne, New York City.

Comments.

Reports by Division Committees:

Pending Trust Legislation, Ralph H. Spotts, Los Angeles, Calif., Chairman.

Current Trust Literature, Herbert H. Scheier, Chicago, Ill., Chairman.

Current Trust Statutes and Decisions, Walter W. Land, New York City, Chairman.

Uniform Common Trust Fund Statute, Oliver Wolcott, Boston, Mass., Chairman.

7:00 P. M.

Ball Room—Cleveland Hotel

Annual Dinner of Section of Real Property, Probate and Trust Law—Informal.

Nathan William MacChesney, Chairman, presiding.

Arthur T. Vanderbilt, Greetings from the American Bar Association:

"The Road to Destiny," Thomas C. Hennings, St. Louis, Mo.

George M. Morris, Greetings from the House of Delegates.

"The Matters Case," Charles M. Thomson, Chicago, Ill.

Wednesday, July 27, 2:00 P. M.

Ball Room—Hollenden Hotel

Real Property Law Division; Third Session, George E. Beers, New Haven, Conn., Vice-Chairman and Director of Division, presiding.

Report of Committee on Real Property Financing; Horace Russell, Washington, D. C., Chairman.

"Proposed Uniform Real Estate Mortgage Act."

Comments:

Harold L. Reeve, Chicago, Illinois.

Isaac S. Rothschild, Chicago, Illinois.

"Commercial Property Financing."

Comments:

John F. Handy, Springfield, Mass.

Benjamin Wham, Chicago, Illinois.

Address by Claude E. Hamilton, Jr., General Counsel Reconstruction Finance Corporation, "The Reconstruction Finance Corporation and Uniform State Laws."

Parlor B—Hollenden Hotel

Joint Meeting Probate and Trust Law Divisions: Henry Upson Sims, Vice-Chairman of Section and Former Chairman of Probate Division, presiding.

Statement by George G. Bogert, Chicago, Ill., Director of Trust Law Division.

"Legal Problems of Successor Trusteeship"; Herbert M. Lautmann, Chicago, Illinois.

Comments:

Irving Carlyle, Winston-Salem, N. C.

John L. McChord, Cleveland, Ohio.

Statement by W. M. Crook, Beaumont, Texas, Director of Probate Law Division.

"Some Phases of Wills"; Hamlet J. Barry, Denver, Colo.

Discussion.

Thursday, July 28, 2:00 P. M.

Ball Room—Cleveland Hotel

General Meeting of Section of Real Property, Probate and Trust Law; Final Session, Nathan William MacChesney, Chairman, presiding.

Reports of Division Meetings for Action:

Real Property Law Division; George E. Beers, Director.

Probate Law Division; W. M. Crook, Director.

Trust Law Division; George G. Bogert, Director.

Statement by Chairman of Section as to any action desired.

Report of Nominating Committee.

Announcements.

Adjournment.

5:00 P. M.

Ball Room—Cleveland Hotel

Meeting of newly elected Council and Officers.

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

FORTY-EIGHTH ANNUAL MEETING
Cleveland Hotel, July 18-23, 1938.

Monday, July 18

The morning and also the evening will be devoted to meetings of Sections and Committees for the consideration of their work and their reports and the further consideration of their tentative drafts of acts to be presented. It is expected that such meetings will be at 10 o'clock A. M. and 8:00 o'clock P. M., respectively, or as soon thereafter as possible.

2:00 P. M. FIRST SESSION

I. Address of Welcome.
II. Response.
III. Roll Call.
IV. Reading of Minutes of Last Annual Meeting.
V. Announcement of Appointment of Nominating Committee.
VI. Address of President, Alexander Armstrong.
VII. Report of Treasurer, Murray M. Shoemaker.
VIII. Report of Acting Secretary, John H. Voorhees.
IX. Report of Executive Committee, William A. Schnader, *Chairman.*
X. Reports of Standing Committees:
1. Legislative, John P. Deering, *Chairman.*
2. Public Information, J. Purdon Wright, *Chairman.*
3. Appointment of and Attendance by Commissioners, Harrison A. Bronson, *Chairman.*
XI. Reports of General Committees:
1. Legislative Drafting, E. E. Brossard, *Chairman.*
2. Uniformity of Judicial Decisions, Donald E. Bridgman, *Chairman.*
3. Compacts and Agreements Between States, Joseph F. O'Connell, *Chairman.*
XII. Reports of Special Committees:
1. On Cooperation with the Council of State Governments and the American Legislators Association, Nathan William MacChesney, *Chairman.*
2. On Cooperation with the Interstate Commission on Crime, Robert S. Stevens, *Chairman.*
XIII. Reports of Sections:
1. Commercial Acts Section, Karl N. Llewellyn, *Chairman.*
2. Property Acts Section, William F. Bruell, *Chairman.*
3. Public Law Acts Section, John P. Deering, *Chairman.*
4. Social Welfare Acts Section, Sidney Clifford, *Chairman.*
5. Corporation Acts Section, Lewis Benson, *Chairman.*
6. Torts and Criminal Law Acts Section, Albert J. Harno, *Chairman.*
7. Civil Procedure Acts Section, Frank M. Clevenger, *Chairman.*
XIV. Reports of Section Committees and Special Committees assigned to Sections. (Twenty-eight in number.)

8:00 P. M.

Section and Committee Meetings.

Tuesday, July 19

9:30 A. M. SECOND SESSION

Deferred Section and Committee Reports.
Consideration of Uniform Aeronautical Code, William A. Schnader, *Chairman.*

2:00 P. M. THIRD SESSION

Consideration of Uniform Act on the Execution of Wills, Willard B. Luther, *Chairman.*
Consideration of Uniform Acknowledgment of Instruments Act, L. Barrett Jones, *Chairman.*

8:00 P. M. FOURTH SESSION

Consideration of Uniform Absentees Property Act, Harry P. Lawther, *Chairman.*

Wednesday, July 20

9:30 A. M. FIFTH SESSION

Report of Nominating Committee and Election of Officers.
Consideration of Uniform Death in Common Disaster Act, Harry P. Lawther, *Chairman.*

2:00 P. M. SIXTH SESSION

Consideration of Uniform Law of Property Act, Henry Upson Sims, *Chairman.*
Consideration of Uniform Act Fixing Basis of Participation By Secured Creditors in Insolvent Estates, Fred T. Hanson, *Chairman.*

Thursday, July 21

9:30 A. M. SEVENTH SESSION

Consideration of Uniform Common Trust Fund Act, George G. Bogert, *Chairman.*
Consideration of Uniform Act Conferring Upon Joint Tortfeasor Discharging Liability the Right of Contribution from His Joint Tortfeasors, Albert J. Harno, *Chairman.*

2:00 P. M. EIGHTH SESSION

Consideration of Uniform Fair Trade Practices Act, Wiley B. Rutledge, *Chairman.*
Consideration of Uniform Act on House Trailer Regulation, Robert K. Bell, *Chairman.*

8:00 P. M. NINTH SESSION

Consideration of Uniform Act Concerning the Release and Substitution of Sureties in Fiduciary Bonds and to Make Uniform the Law With Reference Thereto, Clarence E. Martin, *Chairman.*

Friday, July 22

9:30 A. M. TENTH SESSION

Consideration of Uniform Ancillary Administration of Estates Act, Jesse E. Marshall, *Chairman.*
Consideration of Uniform Act on Insurance Regulation, W. E. Stanley, *Chairman.*

2:00 P. M. ELEVENTH SESSION

Consideration of Uniform Statute of Limitations Act, Jesse E. Marshall, *Chairman.*
Consideration of Uniform Act for Liquidation of Insurance Companies, E. Blythe Stason, *Chairman.*

4:30 P. M.

Memorials.

8:00 P. M. TWELFTH SESSION

Consideration of Deferred Uniform Acts.

Saturday, July 23

9:30 A. M. THIRTEENTH SESSION

Consideration of Deferred Uniform Acts.
Consideration of First Tentative Drafts of Other Proposed New Uniform Acts.

2:00 P. M. FOURTEENTH SESSION

Consideration of First Tentative Drafts of Other Proposed New Uniform Acts.
Unfinished Business.
New Business.
Adjournment.

Other Organizations

AMERICAN JUDICATURE SOCIETY
Hotel Cleveland
Luncheon
Wednesday, July 27, 12:30 P. M.

BAR JOURNAL EDITORS AND BAR ASSOCIATION SECRETARIES
Hotel Cleveland
Luncheon
Thursday, July 28, 12:30 P. M.

CONFERENCE ON PERSONAL FINANCE LAW
Hotel Cleveland
Twelfth Annual Meeting
Edmund Ruffin Beckwith, New York City, Chairman
Tuesday, July 26, 6:30 P. M.

INTERNATIONAL ASSOCIATION FOR THE PROTECTION OF INDUSTRIAL PROPERTY
(American Group)
Mid-Day Club, Union Trust Building, Cleveland, Ohio
Annual Luncheon Meeting
Tuesday, July 26, 12:30 P. M.

Reports of committees on current trade-mark legislation;
Prague Congress to be held June 6-11, 1938;
Report of American Group delegates to Prague Congress;
Reports of President, Treasurer and Nominating Committee, and election of officers;
General Discussion by members.

THE NATIONAL CONFERENCE OF BAR EXAMINERS
Monday, July 25, 2:00 P. M.

Address by the Chairman—A. G. C. Bierer, Jr. of Guthrie, Oklahoma.

Two additional speakers will be announced later. Their remarks will be followed by a general discussion of problems in connection with bar admission and bar examinations.

MEETINGS OF LAW SCHOOL ALUMNI ASSOCIATIONS, LEGAL FRATERNITIES, SORORITIES AND OTHER ORGANIZATIONS

The following Law School Alumni Associations, Legal Fraternities, Sororities and other groups will hold breakfasts, luncheons and dinner meetings during the Annual Meeting of the American Bar Association in Cleveland. Tickets may be purchased and information secured at the General Headquarters of the Association. (More complete details will appear in the Advance Program of the Cleveland Meeting.)

**Chicago University Law School Alumni*, Luncheon, Hotel Cleveland.

**Cincinnati University Law School Alumni*, Luncheon, Hotel Hollenden.

Columbia University Law School Alumni, Luncheon, Hotel Cleveland, Paul J. Bickel, Chairman of Arrangements, Union Trust Building, Cleveland, Ohio.

Cornell University Law School Alumni Association, Luncheon, Hotel Statler, Leonard H. Davis, Chairman of Arrangements, Buckley Building, Cleveland, Ohio.

Delta Theta Phi Legal Fraternity, Luncheon, Hotel Statler, Arthur J. McCormick, Chairman of Arrangements, Guardian Building, Cleveland, Ohio.

Legal Fraternity of Gamma Eta Gamma Alumni, Dinner, Hotel Cleveland, William H. Chamberlain, Chairman of Arrangements, Union Trust Building, Cleveland, Ohio.

Georgetown University Law School Alumni, Luncheon, Hotel Cleveland, James Arthur Gleason, Chairman of Arrangements, Williamson Building, Cleveland, Ohio.

George Washington University Alumni Club, Luncheon, Mid-Day Club, Union Trust Building, Cleveland, Ohio, Lillian C. Belden, in charge of arrangements, Standard Building, Cleveland, Ohio.

Harvard University Law School Alumni, Luncheon, Hotel Cleveland, John B. Dempsey, Chairman of Arrangements, Union Trust Building, Cleveland, Ohio.

**Iota Tau Tau Legal Sorority*, Breakfast, Hollenden Hotel.

Kappa Beta Pi Legal Sorority, Luncheon, Hotel Statler, Catherine Carroll, in charge of arrangements, Guardian Bldg., Cleveland, Ohio.

**University of Maryland Law School Alumni*, Luncheon, Hotel Cleveland.

University of Michigan Law School Alumni, Luncheon, Hotel Cleveland, John R. Kistner, Chairman of Arrangements, Leader Building, Cleveland, Ohio.

Law Alumni of University of North Dakota, Luncheon, Hotel Cleveland, Harrison A. Bronson, Chairman of Arrangements, Grand Forks, N. D.

Northwestern University Law School Alumni, Luncheon, Hotel Cleveland, H. E. Varga, Chairman of Arrangements, City Hall, Cleveland, Ohio.

**Ohio Northern University Law School Alumni*, Luncheon, Hollenden Hotel, Jay P. Taggart, Chairman of Committee on Arrangements, Union Commerce Bldg., Cleveland.

Ohio State University Law School Alumni, Luncheon, Hollenden Hotel, Herschel W. Arant, Chairman of Arrangements, Ohio State University Law School, Columbus, Ohio.

**University of Pennsylvania Law School Alumni*, Luncheon, Hotel Cleveland.

Phi Alpha Delta Law Fraternity, Luncheon, Hotel Statler, Edwin D. Northrup, Chairman of Arrangements, 2084 Cornell Rd., Cleveland, Ohio.

Phi Delta Delta Legal Fraternity, Breakfast, Hotel Cleveland, Mildred P. Bergeron, in charge of arrangements, Standard Bldg., Cleveland, Ohio.

**Phi Delta Phi Fraternity*, Dinner, Hotel Cleveland.

Texas Society, Luncheon, Hotel Cleveland, Harry P. Lawther, Chairman of Arrangements, Tower Petroleum Building, Dallas, Texas.

Vanderbilt University Law School Alumni, Luncheon, Hotel Cleveland, Thomas E. Lipscomb, Chairman of Arrangements, Guardian Building, Cleveland, Ohio.

University of Virginia Law School Alumni, Luncheon, Hotel Cleveland, Robert B. Tunstall, Chairman of Arrangements, Terminal Tower, Cleveland, Ohio.

Western Reserve University Law School Alumni, Luncheon, Mid-Day Club, Union Trust Building, Cleveland, William W. Dawson, Chairman of Arrangements, Western Reserve University, School of Law, Cleveland, Ohio.

Yale University Law School Alumni, Luncheon, Hotel Cleveland, James R. Stewart, Chairman of Arrangements, Terminal Tower, Cleveland, Ohio.

*Information may be secured at the General Headquarters of the Association.

INSTITUTE ON DRAFTING OF WILLS AND TRUSTS SCHEDULED FOR CLEVELAND MEETING

By Will Shafroth
Adviser to Section of Legal Education and Admissions to Bar

WHEN Professor W. Barton Leach rises in response to the Chairman's introduction and commences his first lecture at the Cleveland meeting on "The Drafting of Wills and Trusts," he will be inaugurating a new era in the annual conventions of the American Bar Association. In past years various sections have scheduled programs for the annual meeting which have been of much practical importance to their members. There have also been scattered throughout the convention week a number of addresses which were useful from a realistic standpoint to those who heard them. But the series of lectures to be given by Professor Leach is the first attempt to provide the general practitioner with lectures of the type which members of the Bar in various cities are finding of especially practical value to them in the practice of their profession.

Meetings of the American Bar Association have been of both a social and a business nature. Many of our members come year after year to renew the warm friendships which have been made previously at the meetings and to get some of that cosmopolitan feeling which comes from even a brief association with lawyers from many parts of the country. There has also always been a definite value in the business sessions of the Association. While the real work of the Association must be done mainly during the year, the summing up, the reports, and the action taken are a necessary focus and an extremely worth-while part of the Association's activities. And in recent years the specialists' sections have become a very important part of the Association. From the first they have realized the possibilities of the annual meeting as a place where their members may meet and discuss the latest recent developments in their particular fields. No one who has participated in a meeting where the more expert of his fellow specialists have discussed matters with which his daily practice is concerned, has the least doubt about the value of such meetings.

It is rather strange, then, that heretofore nothing comparable has been developed for the general practitioner. Of course he can and does attend the sessions of the Insurance Section, the Real Property Probate and Trust Section and the meetings of committees such as that on Taxation, with both pleasure and profit to himself. But the recent experience with legal institutes over the country has clearly shown that here is another type of activity which promises to be of especial interest and benefit to the general practitioner—something calculated to afford particular stimulus along intellectual lines. The addition of such a legal institute to the general program should, therefore, do much for the American Bar Association meetings. It can and should provide a new incentive for the rank and file of our membership to attend and to take back with them something of practical value and of the most stimulating nature.

The doctors have long realized this and for many years the educational features of the annual meeting of the American Medical Association have been the most pronounced parts of its program. This is a principal reason why the registration at those meetings, with guests and visitors, sometimes reaches ten thousand. The specialists' sections also predominate there and are closely knit by national associations embracing such specialties as eye, ear, nose and throat, pediatrics, dermatology, and the like. Each section is assigned three sessions of three hours each during the week and the general practitioners are given the benefit of similar periods. In addition, there is on display in an exhibition hall connected with the convention a large number of exhibits, in charge of members who are responsible for them, showing the latest methods in surgery and in the treatment of various diseases. Doctors who attend these meetings have the opportunity to acquire a liberal education in the most recent developments in medicine and surgery and there are many who come, to whom this reason is predominant. This is done without neglecting the social side at the meeting or interfering with the efficient functioning of the A. M. A. House of Delegates.

The same development is gradually taking place in the Association meetings and it will be greatly stimulated by the institute which will be given in Cleveland under the auspices of the Legal Education Section. The time for the lectures has been set for from two to four P. M. on Wednesday and Thursday and ten to twelve A. M. on Friday of the convention week. The subject will be "Certain Phases of the Law of Real Property and the Drafting and Litigation of Wills." Professor W. Barton Leach, the lecturer, is now teaching at the Harvard Law School and has already held many institutes over the country. He is a Reporter for the American Law Institute and adviser on the Restatement of Property. Although only thirty-seven years old, he has been a member of the Harvard law faculty for eight years, following five years of practice in Boston. On graduating from the Harvard Law School, he served for a year as secretary to Justice Holmes of the United States Supreme Court. He is also an entertaining and brilliant banquet speaker, as those who have attended the American Law Institute the past two years can testify.

However, those attending his legal lectures in Cleveland need not expect entertainment. The Institute is given for those who attend it for the single purpose of increasing their knowledge of his subject. Professor Leach wants and is entitled to an audience which will come on time and will stay through the lectures. His material is definitely difficult and is so closely knit that anyone who wants to get something out of it must be prepared to concentrate. An outline will be sent to all those who request it from American Bar headquarters. Admission to the lectures will be only by ticket which may be secured from the convention headquarters in Cleveland at the time of the meet-

ing. There will be no charge for the lectures but as it may be necessary to limit the attendance, tickets will be issued.

The first lecture will deal with powers of appointment and the instruments which create and exercise them. In it Professor Leach will canvass the situations in which the use of the power of appointment is essential in carrying out a scheme of disposition. He will consider the desirable choice between types of powers and suggest provisions for situations which may occur in the future. Subsequently he will discuss the rule against perpetuities and its application. He will point out common types of situations in which the rule constitutes a threat to draftsmen of wills, trusts, deeds and leases. These are but a few of the highlights which he will touch.

During the past year Professor Leach has successfully conducted institutes in Cincinnati, Dallas and Denver. The legal institutes are a part of the program of advanced legal education which the American Bar Association, through its Legal Education Section, has been sponsoring in all parts of the country. The movement has been launched successfully and it is most appropriate that in Ohio, where the first institute was held in 1931 with Dean Roscoe Pound as the speaker and "Developments in the Law of Equity" as the subject, the first institute to be a part of American Bar Association meetings should take place.

The Section of Legal Education suggests to the presidents of all the State bar associations and of all the larger local bar associations where legal institutes have not yet been given that they appoint representatives to attend this institute in Cleveland and to report back to their respective associations in reference to the desirability and feasibility of arranging for similar institutes in their own localities.

DISTINGUISHED LAWYERS TO LEAD INSTITUTE ON FEDERAL RULES

ARRANGEMENTS have just been completed for a curtain raiser for the Cleveland meeting which is certain to draw a large number of lawyers from all parts of the country. On the Thursday, Friday and Saturday preceding the week of the Annual Meeting, an intensive course of lectures on the new Federal Rules will be given on the campus of Western Reserve University in Cleveland by some of the members of the Advisory Committee appointed by the United States Supreme Court to draft and submit to the Court for its consideration Rules of Civil Procedure for the District Courts of the United States. These lectures, which will be under the auspices of the American Bar Association through its Legal Education Section in association with the Law School of Western Reserve University, will be an undertaking of the greatest importance and value. Former Attorney General William D. Mitchell, the Chairman, Mr. Edgar Bronson Tolman, the Secretary, Dean Charles E. Clark of the Yale Law School, the Reporter, Professor Edson R. Sunderland of Michigan, Professor Wilbur H. Cherry of Minnesota, and Mr. Robert G. Dodge of Boston, all members of the Advisory Committee, will each participate in the discussions.

No more authoritative group could be assembled to discuss the new Rules for the benefit of the bar of the nation. The course will be an intensive one, with two hour sessions morning and afternoon on July 21, 22 and 23, and a seminar for Ohio lawyers dealing with the contrasts under the Ohio practice in the evening on the first two days of the Institute, under the direction of Professor William W. Dawson, of Western Reserve University School of Law. For the practitioner who prides himself on keeping up to date, for the specialist in the Federal courts, for the lawyer who would like the opportunity, for a brief moment, to "go back to school," and for any attorney who is interested in knowing what a modern code of procedure should contain, the lectures on the Federal Rules will offer a rare opportunity. The registration fee for the Institute will be five dollars, and it will be open to all lawyers whose applications, accompanied by checks, are received at American Bar Headquarters while the enrollment is still within the limits of the capacity of the hall in the Allen Memorial Library. None of the registration fee goes to members of the Advisory Committee for compensation.

President Vanderbilt has appointed a committee of which Professor Dawson is chairman, with a member from every state, the function of which will be to see that the Bar is given full information concerning this course and every encouragement to attend. The Legal Education Section by its Council is assisting in every way because the success of this course will give nation-wide impetus to the program of advanced legal education which the Section has so successfully launched this year through the legal institutes and practicing law courses which have been held in many parts of the country.

The lectures will cover all important portions of the new Federal rules. Chairman Mitchell will open the course on the first day with a discussion of the history and scope of the Rules together with some account of the procedure of the Advisory Committee. This will include a consideration of the work of the Bar in the drafting of the rules, the derivation of their provisions, and the problem of securing conformity in fact. Not only will copies of the rules be furnished to each registrant, but he will also receive printed copies of the Committee's Notes of March, 1938, and a copy of the recent hearings before the House Judiciary Committee. In addition, the first 300 registrants will receive by mail copies of the Committee's Report of April 1937 and its Final Report of November 1937. The great importance of this source material on the new rules will be appreciated by every lawyer who has practiced in the Federal courts. Much of this material will soon be out of print and may be unobtainable thereafter.

Dean Charles E. Clark will discuss pleadings, motions and parties on the afternoon of the first day. Consideration will be given to the simplified method of

raising issues, the abolition of demurrers and pleas, the liberal provision for joinder of parties, and third party practice. The evening seminar under the direction of Professor Dawson will consist of a comparison of the new Rules of pleading with Ohio practice.

Friday's session will commence with Professor Sunderland's discourse on Depositions, Discovery, Summary Judgments, and Pre-trial Practice. The new Rules provide a realistic approach to the problem of ascertaining the issues by discovery and pre-trial practice, and point the way by summary procedure to avoid delay where there is no real controversy. These provisions are of practical value and will assimilate federal procedure to the modern practice of the more advanced states. The next subject will be Trials, Verdicts, General and Special, Interrogatories, Declaratory Judgments and Judgments Transferring Title, which Professor Cherry will discuss. Emphasis in the Rules is placed upon convenience and efficiency in trial procedure following the newer systems used in England and many of the states. In the evening seminar pre-trial procedure and trial practice under the rules will be compared with Ohio practice.

On the final day Mr. Robert G. Dodge of Boston will start the proceedings with a lecture on master and reference practice. The efficiency of the master practice as prescribed by the new Rules has been demonstrated by former federal equity practice and the procedure in various states. It is now available in jury trials where the issues are complicated. Mr. Edgar Bronson Tolman will then speak of the Old Conformity and the New, the Preservation of the Right of Trial by Jury, the Demand for a Jury, Instructions, and Judgments Non Obstante. The last lecture, on the subject of appeals, will be given by Chairman Mitchell and will include procedural steps, the record on appeal, and practical consideration of various devices to facilitate appellate practice.

Lawyers do not need to be told why such a series of discussions as these are extremely important and valuable. Take a simple illustration from the subject of summary judgments. This procedure is a method for promptly disposing of cases in which there is no real issue to be tried. It has been extensively used in England for more than 50 years, and has been adopted in a number of our states. In cases where a purely formal issue is raised by pleadings for the mere purpose of delay, the undisputed facts may be shown by answers to interrogatories, depositions or affidavits and the case disposed of summarily. It will no longer be necessary to wait until the case comes on in the usual course for trial. During the first nine years after the adoption of this procedure in New York, the records of New York county alone showed 5,600 applications for summary judgments.

Not only will this course add greatly to the attractiveness of the annual meeting, since most lawyers who attend it will undoubtedly stay over until the following week, but also it will provide a model for courses on the new Federal procedure throughout the country. It will prove a stimulus to an unparalleled activity in the field of advanced legal education, particularly in the field of improving judicial administration and procedure. The Council of the Section of Legal Education regards it as a paramount obligation on the part of every Bar Association which considers itself as more than a purely social organization to make available to its members during the coming Bar year a series of lectures by competent lawyers or law teachers on the subject of the new Federal rules. The Council is prepared to assist any association which desires to set up such a course and suggests as a first step the sending of a representative or official observer to the Institute in Cleveland.

With the Institute on the Federal rules scheduled for the week before the Annual Meeting, and the Institute on the Drafting of Wills and Trusts to be given by Professor W. Barton Leach of Harvard during the week of the meeting, the educational aspects of the Cleveland gathering will be most important. If, as many indications appear to demonstrate, lawyers generally are actually desirous of increasing and bringing up to date their store of legal knowledge, the Cleveland meeting presents an unusual opportunity.

The detailed program follows:

PROGRAM

THURSDAY, JULY 21, 1938

9:30 A. M.

The History of the new Federal Rules—Procedure of Advisory Committee—Scope of Rules.

Honorable Wm. D. Mitchell

2:00 P. M.

Pleadings—Motions and Parties.

Dean Charles E. Clark

7:30 P. M.

Seminar: Comparison of the new rules of pleading with Ohio Practice.

Under the direction of Professor Wm. W. Dawson

FRIDAY, JULY 22, 1938

9:30 A. M.

Depositions—Discovery—Summary Judgments—Pre-trial Practice.

Professor Edson R. Sunderland

2:00 P. M.

Trials—Verdicts, General and Special, and Interrogatories—Declaratory Judgments, Judgments Transferring Title.

Professor Wilbur H. Cherry

7:30 P. M.

Seminar: Pre-trial procedure and trial practice compared with Ohio Practice.

Under the direction of Professor Wm. W. Dawson

SATURDAY, JULY 23, 1938

9:30 A. M.

Master and Reference Practice.

Mr. Robert G. Dodge

The Old Conformity and the New—The Preservation of the Right of Trial by Jury—Demand for—Instructions — Judgments Non Obstante — District Court Rules.

Mr. Edgar Bronson Tolman

2:00 P. M.

Appeals.

Honorable Wm. D. Mitchell

* * *

Registration Fee: Five Dollars

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FULL ENTERTAINMENT PROGRAM AWAITS VISITING MEMBERS AND WIVES AT CLEVELAND

By Cary R. Alburn
Member of the Cleveland Bar

ENTERTAINMENT by water, by land and by air will be available when the lawyers of America convene in Cleveland in July. Lake Erie not only affords refreshing breezes and bathing beaches, but trips by boat to Put-in-Bay with its caverns, to Bass and Catawba Islands with their fishing and vineyards and to Cedar Point with the finest inland beach in America. Polo matches, the Ice Carnival, Summer Opera at the Aquacade, golf and dancing at a galaxy of country clubs, Cleveland's Natural History Museum, magnificent Museum of Art and her lovely gardens and miles of beautiful parkway, and drama in the Play House are a few of the land attractions. The air-minded may avail themselves of the largest and one of the busiest airports in the world.

The Junior Bar conference opens on July 24th, at the Cleveland Hotel with a nation-wide hook-up when Hon. James R. Garfield will deliver the address of welcome and introduce retiring chairman Weston Vernon, Jr., Editor Paul Bellamy of the Cleveland *Plain Dealer* who is also chairman of the Public Relations Committee of the Associated Press, and President Vanderbilt of the American Bar Association.

A luncheon for the ladies accompanying members of the Junior Bar Conference is scheduled for Tuesday at the Country Club, followed by bridge and golf or tennis in the afternoon; and Tuesday evening, a dinner dance with entertainers. Wednesday will see a luncheon at the Mid Day Club on top of the towering Union Commerce (erstwhile Union Trust) Building. A fashion show also is in prospect.

The Entertainment Committee of the Cleveland Bar has arranged a matinee and three evening performances at the Play House of the drama entitled "Libel." This absorbing drama by an English magistrate combines first-class entertainment with an authentic presentation of an English trial scene. Superb acting by the Play House cast brings into sharp relief points of contrast between the English and American procedure and practice.

The Play House is indispensible to the cultural life and entertainment of Cleveland. A non-profit community theater now closing its twenty-second season, it presents yearly a continuous and varied program of plays and operates nightly except Monday during three-fourths of the year. Its buildings on East 86th Street, valued with equipment at three hundred and fifty thousand dollars, contain everything from two complete stages and auditoriums to ballet, luncheon and Green rooms. The smaller theater named after Charles S. Brooks, a Cleveland author of distinction who guided the theater through its early stages, seats one hundred and sixty. The larger theater seats five hundred and twenty-two and is named after Francis E. Drury, a public spirited financier now deceased, who with Mrs. Drury nursed it in its infancy and conwell known, established plays and classics, while the tributed generously toward the present institution. Together these two theaters have an annual box office attendance of one hundred thousand persons, a considerable portion of whom are annual subscribers. The Drury theater is used primarily for the production of well known, established plays and classics, while Brooks theater is used for the more experimental, untried works of authors who have not already established a reputation as playwrights and for plays of limited appeal.

In addition to the director, associate and assistant directors, salaried actors and technical experts, an apprentice group of thirty students and about one hundred theater workers help to carry out the production schedule of about fifteen plays each year. Another educational unit is the children's theater, comprising five hundred children between the ages of eight and fourteen. Under the guidance of staff directors, these youngsters are initiated into the art of the theater. The Play House is now affiliated with Bennington College and Western Reserve University in furnishing practical field work to advanced students of the theater. For the past four years the summer repertoire theater at Chautauqua Institution in New York has been made up from the Play House company.

Under its capable lawyer-director Frederick C. McConnell who came to the Play House in 1921 from Carnegie Institute of Technology and his able assistants and staff, the Play House, says Drama Critic William F. McDermott of the Cleveland *Plain Dealer*, "has become one of the most distinguished institutions of its kind in America." The outstanding position of Cleveland's Play House in the field of the theater again was demonstrated in March of this year when it was invited by Charleston to be the guest company at the formal re-opening of Charleston's recently restored, historic Dock Theater, the "first theater" in America.

Friday evening, July 28th, there will be an Ice Carnival at the Arena, followed by figure skating and dancing for those who wish to participate, and a light supper. The Arena is perhaps the nation's most modern house of sport. After three years of surveys in other hockey rinks, municipal auditoriums and stadiums it was recently completed at a cost of one and one-quarter million dollars on Euclid Avenue opposite the former home of John D. Rockefeller in the section once known as Millionaire's Row. Since its opening in November, 1937, it has successfully staged Ice Carnivals, professional and high school basketball, amateur and professional boxing matches, professional wrestling, six-day bicycle races, transcontinental Roller Derby, professional tennis, a jamboree for ninety-one hundred Boy Scouts and a Wild West Rodeo. An unimpaired view of the spectacle is afforded the occupant of each of its ten thousand seats at all times.

Every evening there will be Summer Opera on the Lake Front in the Great Lakes Exposition Aquacade comparable to Gallo's New York productions at Randall Island and Jones Beach. Says John J. Shubert, "In the Aquacade . . . Cleveland has the finest set-up in the country for summer music entertainment." There will be a canvas covering for the stage and orchestra pit and the audience will be sheltered from the rain. The stage is being constructed on piles in the Lake, with a span of water between the platform and the audience. Thirty-five musicians from Cleve-

land's splendid symphony orchestra have been recruited for the Aquacade. The programs will be of a popular nature and light refreshments will be served.

Baseball fans will have their inning during the week of July 26th when the Cleveland Indians expect to maintain their hold on first place in the American League in their series with Washington and with Philadelphia in Cleveland. At the spacious Cleveland stadium a Sunday crowd of more than sixty-two thousand recently saw the Indians defeat the New York Yankees.

For the lover of equestrian sport Troop A will be available; and polo matches will be staged on Hunting Valley polo field during the week of the convention.

An opportunity will be afforded for garden lovers to view some of the many charming gardens in Cleveland and its suburbs.

Members of the Patent Bar are planning trips to the new strip mill of Republic Steel Corporation and to Nela Park. Republic's new ninety-eight-inch hot and cold strip mill is the largest, fastest and the most modern continuous strip mill in the world. The channel of the Cuyahoga River was changed to provide part of the one hundred and eighty-two acre site. The mill buildings, which rest on nineteen thousand concrete piles and one hundred and twenty thousand cubic yards of concrete, cover twenty-one acres. The new hot mill can roll giant sheets ninety-four inches wide at the rate of twenty-one hundred and twenty-one feet per minute, and out of the cold mill at the rate of eight hundred feet per minute, both world records. Here are furnaces where slabs of steel are heated to a white-heat temperature; the hot mill where the white-hot slabs are rolled out into light plate or long thin strips; hot mill finishing, where the hot rolled plate or strip is processed and cut to desired lengths; continuous pickling, where scale is removed from the surface of strip which is to be further processed; the cold mill; where higher grades of strip are rolled out to lighter gauges; annealing furnaces, where higher grades of strip steel are heat treated; and cold mill finishing where cold finished strip is cut to desired lengths and given final surface treatment.

Nela Park in East Cleveland is the home of General Electric's Incandescent Lamp Department and Specialty Appliance Division. It is purely an experimental and development laboratory. Here on its campus of ninety acres of velvety lawn, trees, shrubs and tennis courts, interspersed with its sixteen ivy-clad buildings of Georgian architecture, thirteen hundred "professors" and their assistants delve into the unknown in artificial lighting. Their researches and experiments extend to the field of electrical refrigeration, illuminating engineering, science of seeing, electrical cookery, and similar fields where electricity may play a major roll. Here also is the Administrative Department of the entire Incandescent Lamp Department and headquarters for the sales promotion, statistical, accounting, engineering, purchasing and manufacturing departments of the twenty lamp factories, the thirteen warehouses and the seventeen sales division offices that make and dispose of one-half of the billion electric lamps consumed annually in the United States.

Under the enthusiastic and able leadership of Lawrence C. Spieth, Chairman of the Executive Committee in charge of preparations, delightful entertainment coupled with a splendid program gives promise of a memorable convention in Cleveland. Further details as to entertainment will be presented in the next issue.

DISTINGUISHED SPEAKERS ARE ON PROGRAM

DISTINGUISHED speakers from England, Canada, and our own country, will make notable the sixty-first annual meeting of the American Bar Association, in Cleveland, Ohio, during the week of July 25th. Reference to the public careers of the Association's guests, in the work of the profession and in the service of government, confirms the expectation of an interesting and memorable meeting, in what is really the sixtieth anniversary of the founding of the Association.

Among the Association's distinguished guests will be Lord Macmillan, who has been a Lord of Appeal in Ordinary since 1930 and who comes again to America especially for this meeting. Those members of the Association who were so fortunate as to meet and hear him at the Chicago meeting of the Association in 1930 or who have lately read his brochure of varied essays (among which is his Chicago address on "Law and Letters") will be particularly happy to join with the whole Association in greeting him.

Concerning Lord Macmillan, Mr. James Grafton Rogers wrote in the February, 1938, JOURNAL:

"Lord Macmillan was a Scottish advocate. He was born sixty-five years ago and named Hugh Pattison Macmillan. He is the son of a Greenock minister. He carried off the usual sequence of university prizes which are the milestones along a brilliant career in his field, took degrees at Edinburgh and Glasgow, came to the front rank of advocates at home and then in London and served with applause on many public commissions. He edited the 'Juridical Review' for some years, long ago. He now holds a life peerage, and in recent years has been sitting as a 'Lord of Appeal in Ordinary' in the highest of British tribunals."

He was born in Greenock, Scotland, on February 20, 1873; Professor Felix Frankfurter said of him, at the Cincinnati Conference on Administrative Law on March 5, 1938, that

"Lord Macmillan is in some ways the most distinguished of all present English judges, and, like most famous Englishmen, he is a Scotchman."

Before becoming a life peer as Baron Macmillan of Aberfeldy in 1930, he had been an advocate of the Scottish Bar since 1897, Lord Advocate of Scotland (non-political) in 1924, and an Honorary Bencher of the

Inner Temple since 1924. From time to time he has served, to an extent greater than any other living Englishman, as Chairman of official Commissions to investigate and report as to various subjects which were deemed important to Great Britain or the Dominions; and those duties have brought him at times to Canada and the United States, and have won for him world-wide renown for skilled and impartial inquiry and fact-finding. The most famous of these reports is that which he made as head of the Royal Commission which in 1931 investigated the economic, financial and political life of England.

Already he counts among his honors the possession of honorary membership in the American Bar Association and the Canadian Bar Association. He is Chairman of the Court of the great University of London, Chairman of the Pilgrim Trust (which has handled the expenditure of funds made available for British universities from American sources), and member of the Carnegie Trust for Scotland. Because of his wealth of learning and experience in varied fields of law and their economic background, his re-visit to the American Bar Association in 1938 is particularly opportune; and he will be welcomed most enthusiastically as a beloved and valued friend.

The official delegate of the Canadian Bar Association this year will be the Honorable E. H. Coleman, Under Secretary of State for the Dominion. He was dean of the law school for the Province of Manitoba, at Winnipeg, and gave long and distinguished service as Secretary of the Canadian Bar Association. He now holds one of the most important career positions in the Dominion Government. Mr. Coleman has been a true and thoughtful friend of the American Bar Association and of many of its leaders, and he will be most cordially greeted in Cleveland.

Also from Canada, there comes again to this meeting the eloquent Leonard W. Brockington, K. C., of Winnipeg, Manitoba, whose address at the annual dinner of the Association at Boston in 1936 charmed all hearers and confirmed in the United States his reputation as at least the peer of any English-speaking orator of today. Mr. Brockington worked as a newspaper reporter and editor in Calgary, in the Province of Alberta; studied law and was called to the Bar; won high repute as a lawyer and orator; and came to Winnipeg to become general counsel for the Canadian Grain Exchange. He will be heard at this year's banquet of the Association.

From the Supreme Court of the United States, two of its younger members will come to this meeting of the American Bar Association, in the persons of Associate Justices Owen J. Roberts and Stanley Reed, each of whom will speak informally at an appropriate occasion. Neither of these jurists is in any sense a newcomer to a meeting of the Association, as each has been present in other years. Mr. Justice Roberts ascended the bench after a most active career at the Bar, during which he often represented the government in the prosecution of important cases. One of his law partners in Philadelphia was Robert McCracken, who has been since 1935 the Chairman of the Association's important Committee on Professional Ethics and Grievances.

As the newest member of the great Court, Mr. Justice Reed will return to the scene of Bar Association work with which he was actively identified at the time of his elevation to the bench. As Solicitor-General of the United States, this Kentucky lawyer commanded the respect and admiration of the Bar; and by virtue of the same office, he was a member of the House of Delegates from its founding. He served also on the Association's Committee on Resolutions at the Boston meeting and on the Committee on Jurisprudence and Law Reform during that Association year. Probably the only sense of regret occasioned by his appointment to the Supreme Court has been that this well-earned promotion has removed him from membership in the House of Delegates, in whose work he took so keen an interest.

A distinguished spokesman of the National Administration who retains his membership in the House of Delegates and his keen interest in the work of the Association, is the Attorney-General of the United States, the Honorable Homer Cummings, of Connecticut, who will attend the Cleveland meeting and take part in its proceedings. He has been *ex-officio* a member of the House of Delegates since its founding, and has been responsible for active and effectual cooperation between the Department of Justice and the American Bar Association in several important matters affecting the administration of justice. The presence of the Attorney-General as the titular head of the American Bar, himself a hard-working lawyer who won renown in the trial of cases, adds to the interest and distinction of meetings of the American Bar Association.

The detailed program of the sessions of the Association, its Sections, and the "open forums" to be conducted by several of its Committees, show the presence and participation of many other outstanding jurists and lawyers, in this year's program. Members of the Association who plan to come to Cleveland may look forward to an interesting and worthwhile meeting.

"The Only True Glory"

"No profession or calling has given so many great names to American history as the bar. There is no state in the Union on which the names of its great lawyers have not shed lustre. An American law list from the beginning would embrace a large proportion of the names held in honorable memory by the American people. There is a passion for military glory amongst all nations, hero-worship. And the glory of the soldier may be more dazzling than the glory of the statesman-lawyer. But it is less solid. For the truest glory of the soldier, here at least, is to preserve the work of the statesman. The path of the soldier, however patriotic or worthy the war, is destruction. The path of the statesman-lawyer is organization; and the path of every lawyer, worthy the name, is preservation. And in a high sense, true heroism may be in a tribunal as well as on the battlefield. Duty, fearlessly and faithfully performed, against all influences and difficulties, is the only true glory. Moral courage is a higher quality than physical. He reads American history superficially, who does not see the illustrious dead of our profession battling in the vanguard for all true political and social amelioration. And he who looks upon society, without seeing in the profession the sentinels of social order, sees through a glass darkly. In civilization, a community without a bar is worse off than an army encamped without sentinels."—*From address of Chief Justice Edward J. Ryan at organization meeting of Wisconsin Bar Association, January* 9, 1878.

AMERICAN BAR ASSOCIATION JOVRNAL

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JOSEPH R. TAYLOR
MANAGING EDITOR
Journal Office: 1140 N. Dearborn Street
Chicago, Illinois

THE UNIFYING IDEA OF THE CLEVELAND PROGRAM

A glance at the program for the Cleveland Meeting is likely to give one a first impression of bewildering variety. There are the general sessions, which alone have a program which would fully justify a gathering of lawyers from all parts of the country. There are the sections, many of which have programs of real convention size. Then there are the open forums of committees, always significant; and now, for the first time, there are to be legal institutes, designed to afford the general practitioners real help in the important subjects to be considered.

But running through all this diversity of plan and program is a central unifying idea, to which all the programs are related and to the support of which they are dedicated: the Administration of Justice. It is only by this multifarious concreteness that the real meaning of the words, "The Administration of Justice," can be brought down from the cloudy generality in which they exist for most people and given real and significant content. One only improves the Administration of Justice—granted the existence and acceptance of certain general principles—by dealing with the many concrete proposals which call attention to real or supposed defects. It is the business of the American Bar Association to furnish these concrete illustrations of what the administration of justice should mean in action, and the various programs for the Annual Meeting show a determination to discharge its responsibility.

Such considerations suggest the proper and natural attitude for members who may be inclined to believe that there is such a wealth of program offered that it is a hopeless task to give it the attention which it deserves. It is—for one member. But what each member may do and do effectively is to devote his attention, aside from the general sessions, to the things in which he is interested—the fields in which he feels most inclined to learn or help—and to get the satisfaction of completeness in the sense that he is contributing his part to the general whole—that he and his fellow-members all together are dealing with a vast subject on probably a more complete and effective scale than has ever before been attempted.

It is "this vision of the general whole" that gives unity and higher significance to men's thinking in every field. It should have a peculiar inspiration for lawyers in their own field and shed over the difficult details of work in many special directions the shining light of the great objective toward which they look and labor.

AMENDING THE ORGANIC LAW OF THE ASSOCIATION

This issue of the JOURNAL conveys to members of the Association due and formal notice of several proposals by members of the Association to amend its Constitution and By-laws, in respects shown by the amendments as filed. Each of these will be voted on, by the House of Delegates and by the Assembly, at the Cleveland meeting next month.

These proposals to change now the basic law and structure of the Association as adopted at the Boston meeting two years ago should be examined and studied by every member of the Association, to the end that the action taken in Cleveland shall be based upon full understanding and shall reflect, as far as possible, the ascertained wishes of the rank and file of Association members and of the constituent State and local Bar Associations represented in the House of Delegates. The existing Constitution and By-laws of the Association should of course be subject to change from time to time in the light of experience but approvals of amendments should not be voted under any misapprehensions as to their scope and effects.

Some of the proposals which have been formally filed and noticed are sponsored by the appropriate Committee of the House of Delegates and offer for consideration amendments in the nature of minor improvements suggested by the experience thus far had in the operation

of the Constitution and By-laws adopted in Boston. Other proposals are filed by individual members who have long been active in the affairs of the Association. Such proposals ask for fundamental changes in the present structure and procedures.

Each proposal should be studied and acted on according to its merits. It is a vital part of the democratic machinery of the American Bar Association that any member can propose an amendment to its Constitution and By-laws, upon which each the House of Delegates and the Assembly must act, with a referendum to the whole membership of the Association if those two bodies disagree. The views of the rank and file of the membership should and will control and determine the fate of these proposals.

DISTINGUISHED GUESTS

Elsewhere in this issue we give the detailed announcements of the annual meeting which will mark the sixtieth anniversary of the founding of the typical American institution known as the American Bar Association. The change from the small but selective and truly distinguished beginnings at Saratoga Springs, New York, in 1878, to the vast and dynamic assemblages which came together in Boston in 1936 and Kansas City in 1937, and will convene in Cleveland next month, marks a great transition as well as an impressive march of time; and the Association has meanwhile become a factor in the enlightened, conserving public opinion of America, as well as in the constructive and competent draftsmanship of legislation and administrative regulations in our time.

President Vanderbilt and his associates on the Board of Governors are to be felicitated and thanked for the acceptable fulfillment of their responsibility for the assembling of an attractive and forward-looking program for the Cleveland meeting. The sessions will be such as no lawyer can afford to miss by his own choice. It will be a *working* session; but the scheduled addresses will also be of vital interest to the public as well as to the profession.

The outstanding event will be the presence of Lord Macmillan, judicial statesman of the first rank, who comes again to America and to this meeting at the earnest invitation extended to him by President Vanderbilt, who went to England for the purpose in February. Members of the Association will warmly welcome this gifted jurist who has shown such a familiarity with law in the United States as well as throughout the British Commonwealth of Nations. American lawyers will be happy to greet also the distinguished Delegate of the Canadian Bar Association, the Under-Secretary of State for the Dominion, Mr. E. H. Coleman, and the peerless orator of the Western provinces, Mr. Leonard W. Brockington, K.C., of Winnipeg, Manitoba.

The administration of justice in the United States will be ably represented by two members of the Supreme Court, by the Attorney-General of the United States, and by others who hold high place in the Courts of the United States or in the National Administration. The thoroughly representative character of the membership and the work of the American Bar Association has been perennially attested by the programs of its annual meetings; and this will be true in full measure in Cleveland next month, when American lawyers meet for the sixty-first consecutive time to take counsel together as to the vital problems of their country.

AN AUTHORITATIVE STATEMENT

It will be recognized as appropriate that Mr. Thurman Arnold, Assistant Attorney-General of the United States, utilizes this issue of the American Bar Association *Journal* for an authorized statement as to "Prosecution Policies under the Anti-Trust Acts." Lawyers and laymen alike will regard this official declaration as timely and informative reading.

The significant fact is that as Attorney-General Cummings and Mr. Arnold make an effort to use chart and compass in a clarification of policy in a field where lawyers have never had a sense of certainty or firm footing, the magazine of the American Bar Association is selected for this authorized avowal of the policies of the Department of Justice. Mr. Arnold is no newcomer to the columns of the *Journal*, which have been open to him for the presentation of his reasoned views, even when, on the particular matter, they were at variance with those voted by Association members. The *Journal* is glad to receive from Mr. Arnold, and to publish at this time, a declaration of views which is so timely, informative, and significant.

THE EXAMPLE ALREADY SHOWS ITS INFLUENCE

Evidence accumulates to support the view that the Revised Rules of Federal Civil Procedure will furnish an example to which the States will pay increased attention, thus paving the way for greater national uniformity.

The Judicial Council of the Arizona State Bar has recommended that the new rules of

Federal Procedure for the District Courts be adopted in Arizona in order to secure conformity in practice between the Superior Courts and the Federal District Courts. And at the recent meeting of the North Carolina Bar Association President Winslow declared that "now is the psychological moment for the States to study the problem of making their procedure conform with the procedure of the Federal Courts, not only for the simplification of the practice, and consequent increase in the efficiency of the court system, but also as a matter of national policy. The process begun in one State will continue until it has swept the country."

The contribution of Mr. Roy D. Burns, in the April South Dakota Bar Journal, reprinted in our April issue, suggests how simple the undertaking will be in most cases. "The South Dakota lawyer can take up the Federal rules," he says, "with the assurance that in the fundamentals of practice those rules follow the philosophy and underlying theories of the South Dakota procedure." The lawyers of many other States will doubtless find the same thing. In fact, while the rules were in preparation, it was pointed out in many instances how few important divergences from the practice in certain States they embodied.

THE WHY OF SUSTAINING MEMBERSHIPS

IF the American Bar Association is to play the great part which the country increasingly expects of the Bar and the members of the Association are so eager to have it play, at least two things are necessary. These are members and money. Members are necessary because it is primarily through the members that the ideas and programs developed by our sections and committees and confirmed in our annual meetings are implemented and given life at home. We need members also because it is through them that we get the funds necessary to achieve the Association's objectives. Fortunately the membership of the Association is showing a steady growth. Results so far indicate that the new members this year will number in the thousands. Our membership is now at an all time high.

But in this process there is a lag. The irony of the situation is that we are limited in developing many of the very activities which attract new members (and through them the funds requisite to both better performance and expansion) because we do not have the money so to do. Our work in the field of American citizenship has been crippled for years because of the lack of funds. Today the Junior Bar group, with one-quarter the appropriation they should have, are drawing national attention by their brilliant speaking campaign. Do you know that over 1,000 of these younger men, at a sacrifice of their time and energy, are discussing the Constitution and the obligations and privileges of citizenship before the schools, discussion clubs and over the radio? Isn't it the duty of the older members of the Bar adequately to finance this work?

The new section of Judicial Administration, under the stimulating leadership of Senior Judge John J. Parker, of the United States Circuit Court of Appeals for the Fourth Circuit, and of other outstanding members of the American Bench and Bar is laying a foundation for advance which has no parallel in Association history. New surveys and recommendations have been undertaken with respect to Administrative Agencies and Tribunals, Judicial Administration, Simplification of Appellate Procedure, Improvements in the Law of Evidence, Trial Practice, and Selection of Juries.

The work of our Committee on the Unauthorized Practice of the Law requires almost daily contact with and support for over four hundred state and local bar association committees dealing with this work. Our Committee on Law Lists, our Committees on Economic Condition of the Bar, on Labor Employment and Social Security, on Administrative Law, on Federal Taxation, are illustrative of the response of the Association to the problems in the fields of the law which are demanding solution.

All these things must be done well. It takes funds to translate these programs into action.

If our studies in the development of the public relations of the lawyers and a re-education of the public as to the place of the lawyer and the organized bar in the community are to go forward, progress will be handicapped if we must wait for the lag in membership dues to eliminate itself.

Realizing that there are many members who are fully sympathetic with this situation and who wish to make some contribution to a solution the opportunity offered by the sustaining membership has been created. Here is the opening not only for those who already are actively engaged in the work of the Association but for many who cannot join in the actual work.

The sustaining membership gives no privileges of any kind. It creates no distinction between members. There will be no published lists of such members. No compulsion is intended or to be implied. This project was devised to give those who wish such a grand opportunity to assist the Association in a concrete way.

This is the why of sustaining memberships.

GEORGE MAURICE MORRIS
HAROLD J. GALLAGHER
JAMES C. COLLINS
CHARLES A. BEARDSLEY
CARL B. RIX
COMMITTEE ON WAYS AND MEANS

"FOR DISTINGUISHED SERVICE TO HUMANITY"

National Institute of Social Sciences Bestows Gold Medal on Hon. John W. Davis, Former President of American Bar Association—Judge Thacher's Presentation Speech—Citation—Mr. Davis Replies in Address of Moving Eloquence and Earnestness, in Which He Sets Forth the Three Qualities Every Lawyer Should Possess

A SIGNAL honor was paid to a former President of the American Bar Association when, on May fifth, the National Institute of Social Sciences bestowed upon John W. Davis one of its gold medals for distinguished service to humanity. In behalf of the Institute, the presentation of the award was made by former Judge Thomas D. Thacher, who also won renown as a Solicitor-General of the United States. The character of the tribute paid to Mr. Davis as a lawyer evoked a response of moving earnestness and eloquence; and the citation and the response combined to produce an occasion which should stir the spirit and heighten the self-respect of lawyers everywhere. Especially noteworthy were Mr. Davis' declaration and definition of three qualities which every lawyer should possess, as "utter fidelity to the cause of a client without thought of popularity or unpopularity to be won or incurred, a genuine desire for the administration of justice under the law, the only cement that can hold together a society of free-born men, and a burning passion for human liberty."

The third quality he emphasized as one that must prevail in "every true lawyer, certainly every American lawyer," especially today, when "the lamp of liberty has gone out under totalitarian rule over so much of the earth's surface, and is flickering under a pale imitation of planned economy over so much more."

"When the day of deliverance comes," he added, "I am sure that lawyers will be in the forefront of the fight."

Medals of the Institute were awarded also to Miss Dorothy Thompson and to Walter S. Gifford, President of the Charity Organization Society of New York.

In presenting the medal to Mr. Davis, Judge Thacher said:

REMARKS BY JUDGE THATCHER

On such occasions as this one is oppressed with a sense of indelicacy in praising a man in public and to his face. . . . And yet there is significance in such occasions, for the excuse and objective is not so much to honor the victim as to emphasize the public importance of his life and accomplishments in relation to the vital and critical problems of the day.

John Davis is preeminently a great barrister, and in honoring him you honor his calling, at a time when its importance to the integrity of our Government cannot be exaggerated,—and should not be disparaged even by those who are impatient with justice. I do not propose to give you a chronological catalogue of his many honors and achievements. Permit me merely to say that he comes from West Virginia, where he was born and bred and practiced law, and was twice elected to Congress, to resign and become Solicitor General of the United States, and later Ambassador to Great Britain. In 1924 he was nominated by his party for the Presidency of the United States. He is an Honorary Bencher of the Middle Temple, one of the English Inns of Court; was President of the American Bar Association, of the West Virginia Bar Association, and of the Association of the Bar of the City of New York. Today he is the most eminent member of his profession in this city, and of the Bar of the Supreme Court of the United States.

Lord Birkenhead, the Lord Chancellor of England, once took John Davis through Gray's Inn, and showed him a plaque erected in memory of Lord Bacon. Mr. Davis read the inscription and turning to Lord Birkenhead said: "What striking similarity between the record of his career and of yours." Birkenhead replied: "Yes, but Bacon was not a great advocate." If the Lord Chancellor had recalled the career of Joseph Choate he might have added: "But what a striking similarity there is between your own career and the career of Joseph Choate." And if he had, no doubt you might have said: "Yes, but Mr. Choate was not a Congressman."

The similarity between the careers of Mr. Choate and Mr. Davis is striking. Each of these men, in the course of his career, was President of the American Bar Association, of a State Bar Association, and of the Association of the Bar of the City of New York. Each was an Honorary Bencher of the Middle Temple. Each served with great distinction as Ambassador from the United States to Great Britain, and such service—eminent and important as it was—was merely an interlude in a preeminently successful and honorable professional career.

When, in 1915, Robert Lansing became Secretary of State, it was necessary to fill the position of Counsellor of the State Department which he had occupied, Colonel House, appreciating that the critical problems of international law evolving from the World War demanded the selection of a man of the highest competence, character and ability, suggested to President Wilson that John W. Davis, then Solicitor General, be selected, quoting a member of the Supreme Court as saying that Davis ranked as one of the greatest Solicitor Generals the Department had ever had—an opinion which, the Colonel added, was shared by the Attorney General and by almost every member of the Supreme Court.

President Wilson replied to this suggestion that although Davis would be admirable wherever he might be placed, he was the best Solicitor General of the last twenty years and it seemed unwise to transfer him from the Department of Justice. Considering the distinction of his predecessors who had held the office, including such men as William Howard Taft, Lawrence Maxwell, Lloyd Bowers and Frederick Lehman, these were words of high praise for a man in his early forties.

There is a tradition in that office, for which he was very largely responsible, that every case decided rightly is a victory for the Government. Because of this tradition the rule of the Solicitor General is that while all of his talents must be employed in the assertion and vindication of the rights of Government, they should never be employed to accomplish injustice or to harass its citizens with futile litigation. No office in the land demands from its incumbent a higher sense of professional responsibility. No lawyer has ever returned to private practice from that office with a higher reputation or with more brilliant talents than John W. Davis, nor has any other employed his talents more honorably or courageously.

Replying to a correspondent who, in the Spring of 1924, urged him to abandon his practice and seek the Democratic nomination for President, Mr. Davis refused to throw over his clients and desert his colleagues, and in the course of his letter said:

"The only limitation upon a right-thinking lawyer's independence is the duty which he owes to his clients, once selected, to serve them without the slightest thought of the effect such a service may have upon his own personal popularity or his political fortunes. Any lawyer who surrenders this independence or shades this duty by trimming his professional course to fit the gusts of popular opinion, in my judgment, not only dishonors himself but disparages and degrades the great profession to which he should be proud to belong. You must not think me either indifferent or unappreciative if I tell you in candor that I would not pay this price for any honor in the gift of man."

More recently John Davis and other members of the Bar who have asserted against the Government and its agencies rights of their clients predicated upon constitutional limitations of power have been publicly criticized and condemned by public officials in high places, who attempt to discredit them in the eyes of the people. If ever such criticism achieves its purpose by destroying the independence and courage of the Bar in asserting and maintaining the right of every individual to question the power of government in every court, then indeed the integrity of our institutions will be endangered.

Elihu Root once said:

"If we study the annals of those countries in which the Bench and Bar tremble under fear of political power we shall begin to realize how much America owes to the independence and courage of her Bar. Above all else the American lawyer has loyalty, loyalty to his cient's cause. That cause is his, and to it his learning, experience, industry and skill are devoted ungrudgingly."

One who knows and cherishes the fidelity and independence of the American Bar can have no fear, even in these days, that public criticism or indignant condemnation will prevent the assertion or defense of right against the Government by members of the Bar, regardless of position or personal consequence. Picture Erskine standing in an English Court, the victim of public indignation because he came to the defense of Thomas Paine, indicted for publishing "The Rights of Man." His response to such criticism will never be forgotten so long as there are courts where individual liberty is cherished.

The legal profession is great because its independence and fidelity are essential in the courts of any country where the supremacy of law, and not of men, is the foundation of government.

In other parts of the letter I have quoted, John Davis makes clear his practice and belief that distinctions between persons should be unknown to the advocate, as they are to a court, if right needs vindication or defense. He has ignored such distinctions in his practice. He has freely given of his time and of his strength, without expectation of reward, to prevent the impeachment of a Federal Judge in the integrity of whose judicial conduct he had confidence; to the defense of a member of the Bar unjustly accused and convicted of a serious criminal offense—a case in which he secured a reversal of the unjust conviction in the Appellate Court, which characterized the judgment as "grossly wrong and a wicked diversion of justice which not only placed the stigma of a felon upon the defendant but deprived him of his liberty, his profession and his honor, for conduct without taint of moral turpitude or personal profit and for advice given in good faith in his capacity as a lawyer."

He has represented before the Supreme Court of the United States a Professor of Divinity, urging that he was unlawfully deprived of the privilege of becoming a citizen because of his unwillingness, upon religious grounds, to bear arms in the defense of the United States. These are but instances within my personal knowledge of his unselfish devotion to the cause of justice. His words which I have quoted merely state his common practice, and are worthy of comparison with those of Erskine. More than at any other time in our history we need such men at the Bar today!

And thus I think it most fitting that the National Institute of Social Sciences should present its Medal to The Honorable John W. Davis, under the following citation:

"In recognition of your distinguished attainments in the field of Jurisprudence; as Ambassador Extraordinary and Plenipotentiary to Great Britain, 1918-1921; Counselor, American Red Cross, 1913-1918; as Member of the American Delegation for Conference on Treatment and Exchange of Prisoners of War; President of the English-Speaking Union of the United States, and in further recognition of all that you represent and in the upholding of the ideals of your country."

May I add a sentence from a letter of the Earl of Chatham to his nephew, Thomas Pitt?

"So *macte tua virtute!* go on and prosper in your glorious and happy career; not forgetting to walk an hour briskly every morning and evening to fortify the nerves."

RESPONSE BY MR. DAVIS

Among the melancholy ghosts that stalk the corridors of legal tradition, there are three that have always been considered subjects of special pity. The first of those, with which we are not concerned at the moment, is the man who in his vanity seeks to be his own lawyer. He, by common acceptance, has a fool for a client. The second is the over-zealous cross-examiner who persists in asking the one fatal question too much. Josh Billings said, "When you strike ile, stop borin'. Many a man has bored clean through and all the ile has run out." And the third that I think might serve as a special warning here is the loquacious advocate who insists on talking after the Court has indicated a determination to decide in his favor. He forgets how fast the judicial wind can change.

With this example in mind, since the Institute has made this wholly unexpected and undeserved decision in my favor, and Judge Thacher has exhausted his utmost ingenuity in writing an opinion to vindicate its action, elementary discretion on my part would dictate that I should content myself by saying "Thank you" and then sit down. Indeed, I think I might

imitate the very model of an after-dinner speech that was delivered in this town a week or ten days ago by Mr. Henry Ford, and that consisted of just two sentences.

But you must let me say, Mr. President, how very greatly I appreciate the honor of having my name placed upon the roll of the Medalists of this Institute. One who comes to that list, conscious of his own lack of merit, has this single comfort: his inadequacies will be entirely concealed in the reflected blaze of glory that shines from his companions on the roll. . . .

I am grateful to Judge Thacher for the strain which he has put upon his judicial conscience in this opinion to which I refer. Of course, I recall that having retired from the Bench which he once so highly adorned, he has come back to the Bar and has assumed the duty of making the best case for his client that he can. When I heard the introduction which the President gave him, my heart sank for a moment, because I realized that this Medal was much more truly his than mine and I thought perhaps the Medals Committee had changed their minds at the last moment. Certainly no man could perform the office of exculpation, or any other function at the Bar, better than Judge Thacher. Praise from him is praise indeed.

Lawyers, I suppose, are quite as human as any other men, and maybe a little more so, and praise is just as sweet and as rare, and as rare and as sweet to them as to any group in the world. We do not get a surfeit of it. As far as I read literature, sacred and profane, if there is any person who has come forward to speak a kind word for the Bar, I do not now recall it. Poets, philosophers, historians, essayists and even politicians, some of whom were lawyers in a previous incarnation, have taken a fling at us.

You remember that after Jack Cade had promised his followers cheaper bread and better beer and ten hoops on every three-hoop pot, and all the realm in common, such promises in short as demagogues have always been making since the world began, Shakespeare has him agree to the program of Dick, the butcher —"The first thing we do let's kill all the lawyers,"— because, I suppose, they were, even in that day, obstacles to the more abundant life. And a modern poet, Carl Sandburg, puts these very macabre and depressing questions in a recent poem: "Why is there always secret singing when a lawyer cashes in? Why does the hearse horse snicker hauling a lawyer away?"

And yet, in spite of this rain of obloquy, these hailstones of wit, this wind and tempest, the lawyer has survived. The individual usually fulfills the legal aphorism—working hard, living well and dying poor—but the trade goes on. The lawyer continues to be the adjuster of private controversies—many more than anybody suspects—the defender of private rights, the unbonded fiduciary of a thousand trusts. More than that, he throngs your legislative halls, he sits in your executive chairs, he presides over your Bench; and commerce and industry and finance time and time again call the lawyer to their posts of greatest responsibility and power. A profession of which such things can be said cannot be wholly without merit or wholly without usefulness in the world.

Now, what does the lawyer do and what should he do to justify the place which he holds in every free society? I assume for the lawyer—if Judge Thacher will permit me, for all lawyers—that they possess the elementary virtues of honesty and industry and temperance and charity and those other things which go to characterize the higher class of the community. But with that assumption made, let me, in all seriousness, come to three qualities which I think the lawyer should possess and which I am glad to believe the great majority of my colleagues exemplify. Perhaps in the statement of them I may confirm my own belief by a repetition of my creed.

The first of these qualities Judge Thacher has eloquently described: Utter fidelity to the cause of a client, with no thought of popularity to be won in his defense, no thought of unpopularity to be incurred by the assumption of his cause. When old Malesherbes came voluntarily from his serene and safe retirement to defend Louis XVI before the Revolutionary Convention in Paris, he lost his case, as it was predetermined that he should, Louis lost his head, and a few months later the venerable head of Malesherbes followed that of his King into the bloody basket. But generations of lawyers since have worshipped his memory as Christians worship the martyred Stephen. When John Adams came to the defense of Captain Preston and his British soldiers after the so-called Massacre in Boston's King Street, with all of Boston clamoring at his door; when Andrew Hamilton came from Philadelphia to New York to the defense of John Peter Zenger and struck that great blow for the freedom of the press in America, they but did what every lawyer should rejoice to do if a like summons came to him.

The second quality which I invoke for the Bar is a genuine desire to see justice administered under the forms of law. I know there are two sides to every case. I have seen some cases in which there were a good many more, and they cannot all win. We all remember the story of the absent litigant who, when his lawyer telegraphed him that justice had triumphed, wired back, "Take an appeal immediately." But the story of the struggle for law, for a law paramount and supreme, is the story of mankind's long march upward from the brute; and justice administered by human hands, poor and weak, wavering and fallible, often mistaken, is still the only cement that can hold together a society of free-born men.

Last, I think there should be in the heart of every true lawyer, certainly of every American lawyer, a burning passion for human liberty, for the right of all men, as Kipling so finely puts it, "To live by no man's leave, underneath the law." "Liberty! It is a word to conjure with and not to vex the ear with empty boastings. Only in partial gleams has she yet shone among men, yet all progress hath she called forth." I am quoting, as you realize, the words of Henry George in his splendid apotheosis to Liberty which is one of the noblest passages of English prose. Liberty has been the beacon light of every step in man's advance. Under liberty alone can man prove himself worthy of the divine paternity he claims. And because there are always men who glory in mastery over their fellows, that liberty can only be retained and preserved by a ceaseless and eternal vigilance. To keep that untiring sentry-go is the first, the supreme duty of every lawyer.

In the Nineteenth Century most of those dwelling in the civilized world treated liberty as a thing no less normal, ordinary and inevitable than the very breath they drew. Even those who did not yet possess it felt it almost within their grasp. How different the picture today! Over how much of the earth's surface has the lamp of liberty gone out under totalitarian rule, and over how much more does its flame dance and flicker

under the ghostlike breath of a planned economy! Who is to guard that flickering blaze? Who is to relight that extinguished fire? Some champion may arise to cut with his sword the bonds that are being fastened on men and nations. Some orator may stand forth to waken servile and dormant souls again with the call to freedom. But whenever and however the day of deliverance comes, I hope, I believe, nay I am sure that lawyers will be in the forefront of the fight.

Mr. President and Judge Thacher, insofar as what you have said and done tonight gives me assurance that the profession I love has taken no injury at my hands, I thank you humbly from my heart.

Arrangements for Annual Meeting, Cleveland, Ohio

July 25-29, 1938

HEADQUARTERS—HOTEL CLEVELAND

Hotel accommodations, all with bath, are available as follows:

	Single for 1 person	Double (dbl. bed) for 2 persons	Twin beds for 2 persons	Parlor Suites
CLEVELAND..	(All space at Headquarters Hotel exhausted.)			
ALLERTON ..	2.25 to 3.50	3.75 to 5.00	$4.50 to $6.00	$7 & up
AUDITORIUM	3.00 to 3.50	4.50 to 5.00	6.00 to 7.00	
CARTER	3.00 to 5.00	5.00 to 7.00	7.00 to 10.00	12 & up
HOLLENDEN	3.50 to 7.00	5.00 to 7.50	6.00 to 12.00	12 & up
STATLER ...	3.00 to 6.00	4.50 to 8.00	5.00 to 8.00	10 & up

Explanation of Type of Rooms

A single room contains either a single or double bed to be occupied by *one person*. A double room contains a double bed to be occupied by *two persons*.

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

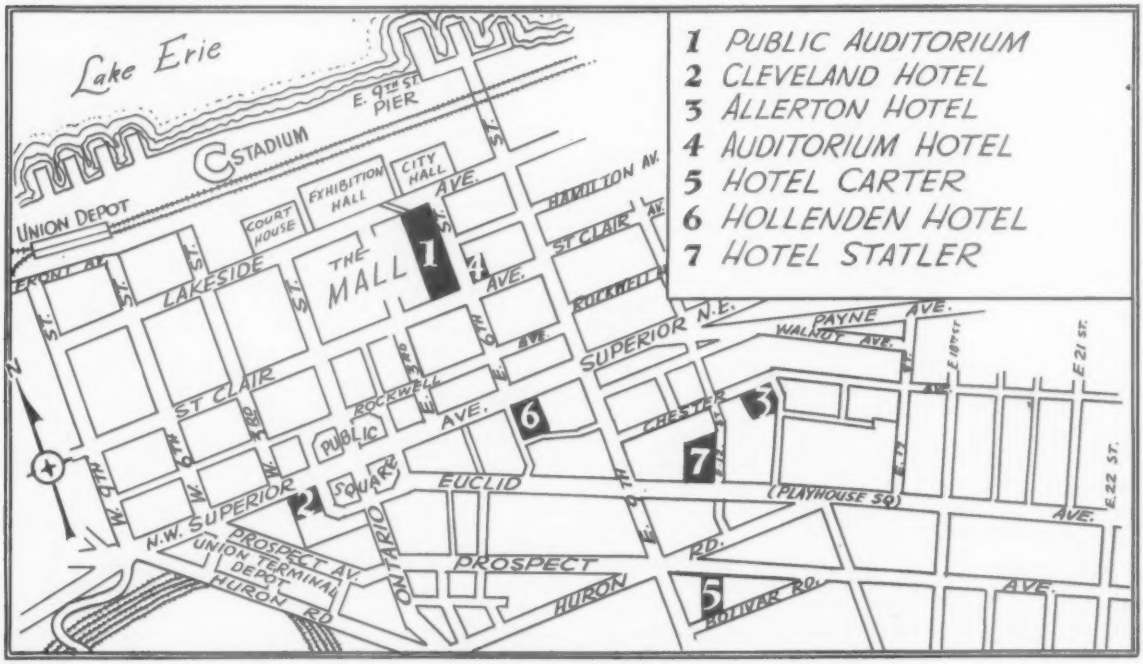
A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with the parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservations, stating hotel desired, number of rooms required and rate therefor, names of persons who will occupy the same, and arrival date, including definite information as to whether such arrival will be in the morning or evening.

Requests for reservations should be addressed to the Executive Secretary, 1140 N. Dearborn St., Chicago, Illinois.

New Service to Members

As part of its program for increased service the American Bar Association has made arrangements to furnish to its members copies of Opinions of the Supreme Court, at a cost of $1.00 for each opinion. Copies of opinions will be sent by air mail within twenty-four hours after the opinion is handed down, which means that they should be received anywhere in the United States on the second day. Requests for opinions may be made prior to the time the decision is announced. All requests should be addressed to the American Bar Association, 1152 National Press Building, Washington, D. C., and should be accompanied by a check payable to the order of the Association for $1.00 for each opinion requested. If it is desired that the opinion be sent special delivery, 10c should be added to the remittance.



MAP OF DOWN-TOWN CLEVELAND

REVIEW OF RECENT SUPREME COURT DECISIONS

In Applying Doctrine of Swift vs. Tyson Federal Courts Have Invaded Rights Reserved by Constitution to the Several States—There Is No Federal Common Law—Purpose of Rules of Decision Act—Chapter X of Bankruptcy Act, Relating to Voluntary Composition of Debts of Certain Municipal Taxing Agencies, Does Not Violate Due Process—Rule Announced in Erie Railroad Co. vs. Tompkins Is Applicable to Suits in Equity as Well as to Actions at Law—Louisiana Act of 1934, Protecting Purchaser of Oil from Claims of Third Persons under Certain Circumstances, Held to Present No Federal Constitutional Question—Bar to Action by Foreign Sovereign—Essentials of Fair Hearing by an Administrative Body—Compacts between States—Apportionment of Waters of Interstate Streams, etc.

By Edgar Bronson Tolman*

Federal Judicial Power—Rules of Decision—"Laws of the State" Defined

Since there is no Federal common law, the substantive law to be applied by the Federal courts in any case except in matters governed by the Federal Constitution or by acts of Congress, is the law of the state, and whether that law be declared by statute or by decision of its highest court, is not a matter of Federal concern. The doctrine of Swift vs. Tyson is disapproved. The purpose of the Rules of Decision act was to insure that in all matters except those in which some federal law is controlling, the federal courts in diversity cases should apply the law of the state, unwritten as well as written. In applying the doctrine of Swift vs. Tyson, the Federal courts have invaded rights reserved by the Constitution to the several states.

Erie Railroad Company v. Harry J. Tompkins, 82 Adv. Op. 787; 58 Sup. Ct. Rep. 817.

In delivering the opinion of the Court, Mr. Justice Brandeis began with this dramatic and significant statement: "The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved."

Tompkins of Hughestown, Pennsylvania, walking at night on a beaten footpath running alongside the tracks of the Erie Railroad Company in Hughestown where he had walked before in safety, was struck by something which looked like a door projecting from one of the moving cars of a passing freight train.

The Erie Company was incorporated in the State of New York and plaintiff brought his suit in the Federal Court for the Southern District of that state probably because recovery under Pennsylvania law was doubtful.

The defense was that under the decisions of the highest court of Pennsylvania persons who travel along a railroad right of way are trespassers and the railroad is not liable for negligent injuries to undiscovered trespassers unless the negligence was wanton or wilful. Tompkins denied the establishment of any such rule by the Pennsylvania courts and contended also that since there was no statute on the subject the question was to be determined in the federal courts as a matter of general law.

The trial judge refused to rule that applicable law precluded recovery, the case was submitted to a jury, a verdict was returned for $30,000 and the judgment was affirmed by the circuit court of appeals.

The Erie had relied upon section 34 of the Judiciary Act of September 24, 1789, which provides:

"The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

The circuit court held that the federal courts were free to exercise their independent judgment on questions of general law in the absence of a local statute; that the question of responsibility for injuries caused by the servants of a railroad was one of general law; and that under generally recognized law the question was one for a jury whether negligence existed when a pedestrian using a permissive path along a railroad right of way was hit by some object projecting from the side of the train. The case came up by certiorari because of the important question "whether the federal court was free to disregard the alleged rule of the Pennsylvania common law."

Mr. Justice Brandeis states the doctrine of *Swift v. Tyson* by quoting from Mr. Justice Story's opinion in that case the following:

"The true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us, that the section did apply, or was intended to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning

*Assisted by Mr. James L. Homire and Mr. Leland L. Tolman. On account of lack of space, publication of reviews and summaries of other decisions already handed down was postponed until the July issue.

and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case."

Reference is also made to the fact that while section 34 was by its language confined to "trials at common law" it had been applied to equity cases because the statute was "merely declarative of the rule which would exist in the absence of the statute," and it is suggested that the federal courts thus assumed "the power to declare rules of decision which Congress was confessedly without power to enact as statutes."

References are made to the repeated doubts that have been expressed as to the correctness of the construction of section 34 and the learned Justice suggests that Mr. Charles Warren's research, which involved the discovery and the examination of the original document has "established that the construction given to it by the court was erroneous." The footnote refers to Warren's "New Light on the History of the Federal Judiciary Act of 1789 (1923) 37 Harv. L. Rev. 49." Since the result of this research bears on the proper interpretation of section 34 of the Judiciary Act of 1789, which is still in force unchanged (28 U.S.C., § 725), it seems necessary to set out the discovery.

In the article to which the opinion refers, Mr. Warren shows that section 34 was inserted by amendment at the very end of one of the drafts of the bill; that as originally drafted section 34 read as follows:

"And be it further enacted, That the Statute law of the several States in force for the time being and their unwritten or common law now in use, whether by adoption from the common law of England, the ancient statutes of the same or otherwise, except where the constitution, Treaties or Statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in the trials at common law in the courts of the United States in cases where they apply;"

that Ellsworth, who drafted it, changed the phraseology of the proposed amendment by striking out the words "statute law" and inserting in their place the word "laws" and by striking out the words:

"in force for the time being and their unwritten or common law now in use, whether by adoption from the common law of England, the ancient statutes of the same or otherwise."

so as to read:

"that the laws of the several States except where the constitution, treaties or Statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."

Mr. Warren suggests that "Statute law" was changed to "laws" and the other words were stricken out with the intent that the word "laws" should embrace all the words deleted. This view seems now to have been adopted by MR. JUSTICE BRANDEIS.

The opinion next refers to the widespread criticisms of the doctrine of *Swift v. Tyson*, particularly after the decision of the *Taxicab case* in which federal jurisdiction was acquired by the reincorporation of a Kentucky taxicab company under the law of Tennesse, so as to give the reincorporated Tennessee company the right to bring suit in a Kentucky federal court against another Kentucky taxicab company. In that case the doctrine of *Swift v. Tyson* was invoked and upheld. The federal district court of Kentucky, in the absence of a Kentucky statute, but in the face of Kentucky state decisions, sustained a contract between the complainant taxicab company of Tennessee and the railroad company of Kentucky and granted relief thereon against the Kentucky taxicab corporation which could not, it is said, have been awarded if the case had been brought and tried in a Kentucky state court.

Following the exposition of the *Taxicab case* in which the doctrine of *Swift v. Tyson* had been applied, MR. JUSTICE BRANDEIS continues:

"*Second.* Experience in applying the doctrine of *Swift v. Tyson*, had revealed its defects political and social and the benefits expected to flow from the rule did not accrue. Persistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.

"On the other hand, the mischievous results of the doctrine had become apparent. Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. *Swift v. Tyson* introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the state.

"The discrimination resulting became in practice far-reaching. This resulted in part from the broad province accorded to the so-called 'general law' as to which federal courts exercise an independent judgment."

The opinion continues with the exposition of enlargements of the term "general law" in which it is indicated that many questions primarily of state and local interest were dealt with as questions of "general law."

"In part the discrimination resulted from the wide range of persons held entitled to avail themselves of the federal rule by resort to the diversity of citizenship jurisdiction. Through this jurisdiction individual citizens willing to remove from their own State and become citizens of another might avail themselves of the federal rule. And, without even change of residence, a corporate citizen of the State could avail itself of the federal rule by reincorporating under the laws of another state, as was done in the *Taxicab case*."

Conceding that a doctrine widely applied throughout nearly a century could hardly be abandoned if only a question of statutory construction were involved, the author of the opinion passes to a consideration of constitutional questions and lays down his fundamental tenet as follows:

"*Third.* Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

Protests on this point against the doctrine of *Swift v. Tyson* by MR. JUSTICE FIELD and by MR. JUSTICE HOLMES are noted with copious quotation and the conclusion is stated as follows:

"Thus the doctrine of *Swift v. Tyson* is, as Mr. Justice Holmes said, 'an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.' In disapproving that doctrine we do not hold

unconstitutional Section 34 of the Federal Judiciary Act of 1789 or any other Act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States."

Since the plaintiff had denied the defendants contention as to the decisions of the Pennsylvania courts on the question in controversy and since the court of appeals declined to decide that issue, the judgment was reversed and remanded to the circuit court for further proceedings in conformity with the opinion.

MR. JUSTICE BUTLER, the author of the prevailing opinion in the *Taxicab case*, filed a dissenting opinion in which MR. JUSTICE MCREYNOLDS concurred. After reviewing the facts and the contentions of the parties, he calls attention to the fact that no constitutional question was suggested or argued below or on the appeal, and refers to the general rule that the Supreme Court will not consider any question not raised below and presented by the petition for certiorari. Here he says the Court does not decide either of the questions presented in the petition but "changing the rule of decision in force since the foundation of the Government, remands the case to be adjudged according to a standard never before deemed permissible."

The dissenting Justice quotes at large from the opinion of MR. JUSTICE STORY in *Swift v. Tyson* and refers to the unbroken line of decisions by which the doctrine of that case has been followed He says that the doctrine was not questioned for more than fifty years and then by a single judge. Speaking of the dissenting opinion of MR. JUSTICE FIELD, several sentences of which are quoted in the prevailing opinion, MR. JUSTICE BUTLER says:

"The dissent failed to impress any of his associates. It assumes that adherence to § 34 as construed involves a supervision over legislative or judicial action of the states. There is no foundation for that suggestion. Clearly the dissent of the learned Justice rests upon misapprehension of the rule. He joined in applying the doctrine for more than a quarter of a century before his dissent. The reports do not disclose that he objected to it in any later case."

In support of his statement that the doctrine itself had not been questioned except as stated, he quotes MR. JUSTICE BREWER as follows:

"Whatever differences of opinion may have been expressed, they have not been on the question whether a matter of general law should be settled by the independent judgment of this court, rather than through an adherence to the decisions of the state courts, but upon the other question, whether a given matter is one of local or of general law."

As to the position of MR. JUSTICE HOLMES, his statement in his dissent in the *Taxicab case* is quoted:

"I should leave *Swift v. Tyson* undisturbed, as I indicated in *Kuhn v. Fairmont Coal Co.*, but I would not allow it to spread the assumed dominion into new fields."

The learned JUSTICE also by way of answer to the inference that the decisions of state courts had been flouted said:

"Whenever possible, consistently with standards sustained by reason and authority constituting the general law, this Court has followed applicable decisions of state courts."

In regard to Mr. Warren's discovery, he said:

"The opinion just announced suggests that Mr. Warren's research has established that from the beginning this Court has erroneously construed § 34. But that author's 'New Light on the History of the Federal Judiciary Act of 1789' does not purport to be authoritative and was intended to be no more than suggestive. The weight to be given to his discovery has never been discussed at this bar. Nor does the opinion indicate the ground disclosed by the research. In his dissenting opinion in the *Taxicab case*, Mr. Justice Holmes referred to Mr. Warren's work but failed to persuade the Court that 'laws' as used in § 34 included varying and possibly ill-considered rulings by the courts of a State on questions of common law."

Protesting against that part of the prevailing opinion which seeks to fortify its conclusions on constitutional grounds, and pointing out the difficulty of predicting the consequences of the departure from the old rule, MR. JUSTICE BUTLER said:

"This means that, so far as concerns the rule of decision now condemned, the Judiciary Act of 1789 passed to establish judicial courts to exert the judicial power of the United States, and especially § 34 of that Act as construed, is unconstitutional; that federal courts are now bound to follow decisions of the courts of the State in which the controversies arise; and that Congress is powerless otherwise to ordain. It is hard to forsee the consequences of the radical change so made. Our opinion in the *Taxicab case* cites numerous decisions of this Court which serve in part to indicate the field from which it is now intended forever to bar the federal courts. It extends to all matters of contracts and torts not positively governed by state enactments. Counsel searching for precedent and reasoning to disclose common law principles on which to guide clients and conduct litigation are by this decision told that as to all of these questions the decisions of this Court and other federal courts are no longer anywhere authoritative."

Reference is made in the dissenting opinion to the reluctance of the Court to consider constitutional questions and to hold legislation invalid and repugnant to the fundamental law if the case may be decided on any other ground, and it was stated.

"In view of grave consequences liable to result from erroneous exertion of its power to set aside legislation, the Court should move cautiously, seek assistance of counsel, act only after ample deliberation, show that the question is before the Court, that its decision cannot be avoided by construction of the statute assailed or otherwise, indicate precisely the principle or provision of the Constitution held to have been transgressed, and fully disclose the reasons and authorities found to warrant the conclusion of invalidity. These safeguards against the improvident use of the great power to invalidate legislation are so well-grounded and familiar that statement of reasons or citation of authority to support them is no longer necessary."

The earnestness of the argument in the conference room is evidenced by the following:

"Against the protest of those joining in this opinion, the Court declines to assign the case for reargument. It may not justly be assumed that the labor and argument of counsel for the parties would not disclose the right conclusion and aid the Court in the statements of reasons to support it. Indeed, it would have been appropriate to give Congress opportunity to be heard before devesting it of power to prescribe rules of decision to be followed in the courts of the United States."

Referring to the statute of August 24, 1937, which established safeguards against the declaration of unconstitutionality of any act of Congress until the Government and its law officers had been notified and given an opportunity to be heard, he said:

"Within the purpose of the statute and its true intent and meaning, the constitutionality of that measure has been 'drawn in question.' Congress intended to give the United States the right to be heard in every case involving constitutionality of an Act affecting the public interest. In view of the rule that, in the absence of challenge of constitutionality, statutes will not here be invalidated on that ground, the Act of August 24, 1937 ex-

tends to cases where constitutionality is first 'drawn in question' by the Court. No extraordinary or unusual action by the Court after submission of the cause should be permitted to frustrate the wholesome purpose of that Act. The duty it imposes ought here to be willingly assumed. If it were doubtful whether this case is within the scope of the Act, the Court should give the United States opportunity to intervene and, if so advised, to present argument on the constitutional question, for undoubtedly it is one of great public importance. That would be to construe the Act according to its meaning."

The dissenting opinion concludes with the following statement:

"I am of opinion that the constitutional validity of the rules need not be considered, because under the law, as found by the courts of Pennsylvania and generally throughout the country, it is plain that the evidence required a finding that plaintiff was guilty of negligence that contributed to cause his injuries and that the judgment below should be reversed upon that ground."

MR. JUSTICE REED concurred in the conclusion reached, except insofar as the majority opinion relied upon the uncontstitutionality of the "course pursued" by the federal courts. He quotes from the language of MR. JUSTICE STORY and says:

"To decide the case now before us and to 'disapprove' the doctrine of *Swift v. Tyson* requires only that we say that the words 'the laws' include in their meaning the decisions of the local tribunals. As the majority opinion shows, by its reference to Mr. Warren's researches and the first quotation from Mr. Justice Holmes, that this Court is now of the view that 'laws' includes 'decisions,' it is unnecessary to go further and declare that the 'course pursued' was 'unconstitutional,' instead of merely erroneous.

He indicates that he is not at all sure that the course pursued in *Swift v. Tyson* is "unconstitutional" or that Congress is without constitutional power to declare what rules of substantive law shall govern in the Federal courts and he points out that no one doubts federal power over procedure.

In answer to the assumption in the prevailing opinion that the doctrine in *Swift v. Tyson* could not now be disturbed but for the unconstitutional effect of continuing to follow it, he said:

"In this Court, *stare decisis*, in statutory construction, is a useful rule, not an inexorable command. . . It seems preferable to overturn an established construction of an Act of Congress, rather than, in the circumstances of this case, to interpret the Constitution."

The case was argued January 31, 1938, by Mr. Theodore Kiendl for petitioner and by Mr. Fred H. Rees for respondent.

Bankruptcy—Composition of Municipal Obligations —Constitutionality of Article X of the Bankruptcy Act

Chapter X of the Bankruptcy Act providing for the voluntary composition of indebtedness of certain municipal taxing agencies or instrumentalities with the consent of two-thirds of the security holders and with the authorization of the state, is a valid exercise of the Federal Bankruptcy power. It does not impinge upon the sovereignty of the states, nor does it violate the due process clause of the 5th amendment.

United States v. Bekins et al etc. and Lindsay-Strathmore Irrigation District v. same. 82 Adv. Op. 751; 58 Sup. Ct. Rep. 811.

After the decision in *Ashton v. Cameron County District*, 298 U. S. 513, holding unconstitutional Chapter IX of the Bankruptcy Act, Congress amended the Act for the purpose of bringing it into harmony with that decision.

Chapter IX of the Bankruptcy Act had been held unconstitutional in the *Ashton case* because the provisions of that Chapter were interpreted as interfering with the exercise by the states of powers reserved to them by the Tenth Amendment.

In order to remove these objections the Act was amended by adding thereto Chapter X which limited the governmental agencies subject to the Act to agricultural improvement districts, sanitary and paving districts, road improvement districts, school districts, port improvement districts, cities, towns, and other municipalities.

The privilege of invoking the bankruptcy jurisdiction was extended only to the taxing agency itself and was in no degree compulsory. The approval by the state and the acceptance of the plan of composition by creditors holding at least two-thirds of the aggregate amount of all claims subject to modification by the plan, were made a pre-requisite to its confirmation.

The Judiciary Committee in its report to the House expressed its purpose in the revision of the Bankruptcy Act by the addition of Chapter X, as follows:

"The bill here recommended for passage expressly avoids any restriction on the powers of the states or their arms of government in the exercise of their sovereign rights and duties. No interference with the physical or governmental affairs of a political subdivision is permitted. The taxing agency itself is the only instrumentality which can seek the benefits of the proposed legislation. No involuntary proceedings are allowable, and no control or jurisdiction over that property and those revenues of the petitioning agency necessary for essential governmental purposes is conferred by the bill."

The judiciary committee made this purpose effective by inserting in Section 83(i) of chapter X, the following:

"Nothing contained in this chapter shall be construed to limit or impair the power of any State to control, by legislation or otherwise, any municipality or any political subdivision of or in such State in the exercise of its political or governmental powers, including expenditures therefor."

The Irrigation District was organized in 1915 under California law to irrigate and improve for agricultural purposes over 15,000 acres. For about 18 years it carried on that business and paid the principal and interest of its maturing installments of bonds.

In September 1937 it filed petition in the U. S. District Court in California for the approval of a plan of composition. The petition alleged insolvency, indebtedness approaching $2,000,000.00, default in payment of maturing installments of principal and interest for more than four years, inability of land owners within the district to pay their assessments because of the low price of agricultural products, and a consequent loss of revenue which made hopeless the payment of its obligations in full.

The plan of reorganization provided for the payment of about 60 cents on the dollar of the principal of its bonds in cash for which the Reconstruction Finance Corporation had agreed to make a loan on new refunding serial 4% bonds equal to the amount of the loan. About 87% of the creditors had accepted the plan.

The District Court approved the plan as filed in good faith and ordered the non-assenting creditors to show cause why injunction should not issue staying suit on the securities affected by the plan.

Appellee Bekin appeared and moved to dismiss

the petition on the ground that Chapter X of the Bankruptcy Act violated the Fifth and Tenth Amendments of the Federal Constitution. The Attorney General was notified of the claim of unconstitutionality in accordance with the requirements of the Act of August 24, 1937, c. 754, and the United States intervened in defense of the validity of the statute.

The District court, on the authority of the *Ashton case* dismissed the petition. Direct appeals were taken to the Supreme Court.

The opinion of the Court was pronounced by the CHIEF JUSTICE.

Taking up first the objection urged upon the Court that "composition" was not within the scope of the Bankruptcy power, the CHIEF JUSTICE said:

"*First.* Chapter X of the Bankruptcy Act is limited to voluntary proceedings for the composition of debts . . . it is well settled that a proceeding for composition is in its nature within the federal bankruptcy power. Compositions were authorized by the Bankruptcy Act of 1867, as amended by the Act of 1874. . . It is unnecessary to the validity of such a proceeding that it should result in an adjudication of bankruptcy. . ."

Passing to the question of the invasion of the reserved powers of the several states, upon which the *Ashton case* had turned, the CHIEF JUSTICE said:

"*Second.* It is unnecessary to consider the question whether Chapter X would be valid as applied to the irrigation district in the absence of the consent of the State which created it, for the State has given its consent. . ."

This conclusion was deduced from statutes of California which gave explicit authority to municipal corporations of that state to file the petitions mentioned in the Federal Bankruptcy Statute and to consummate a plan of readjustment of its obligations if the plan was approved by the Federal court.

From the California statute the following declaration was quoted:

"There exist throughout the State of California economic conditions which make it impossible for property owners to pay their taxes and special assessments levied upon real or taxable property. The burden of such taxes and special assessments is so onerous in amount that great delinquencies have occurred in the collection thereof and seriously affect the ability of taxing districts to obtain the revenue necessary to conduct governmental functions and to pay obligations represented by bonds. It is essential that financial relief as set forth in this act, be immediately afforded to such taxing districts in order to avoid serious impairment of their taxing system, with consequent crippling of the local governmental functions of the State. This act will aid in accomplishing this necessary result and should therefore go into effect immediately."

Applying this statement of the situation in California to the wider national scope, the CHIEF JUSTICE declared that similar conditions existed in other states and that "it was this serious situation which led the Congress to enact Chapter IX and later Chapter X."

The opinion finds that no importance attaches to the omission from Chapter X of the Bankruptcy Act of the provision which appears in Chapter IX requiring the approval of the petition by a governmental agency of the state wherever such approval is necessary by virtue of local law. In this connection it is pointed out that if the consent of the state is not required to make the federal plan effective, the omission is immaterial and it is equally immaterial if the consent of the state has been given as it was in this case. The opinion points out that Chapter X requires that the judge find that the petitioner is authorized by law to take all action necessary to be taken by it to carry out the plan. The Court construes the words "authorized by law" as referring to "the law of the state."

Coming now to the main question, whether the exercise of the Federal Bankruptcy power in dealing with composition of the debts of the irrigation district, upon its voluntary application and with the State's consent, constitutes an interference with the essential independence of the State, the opinion continues:

"In *Ashton v. Cameron County District, supra,* the court considered that the provisions of Chapter IX authorizing the bankruptcy court to entertain proceedings for the 'readjustment of the debts' of 'political subdivisions' of a State 'might materially restrict its control over its fiscal affairs,' and was therefore invalid; that if obligations of States or their political subdivisions might be subjected to the interference contemplated by Chapter IX they would no longer be 'free to manage their own affairs.'

"In enacting Chapter X the Congress was especially solicitous to afford no ground for this objection. In the report of the Committee on the Judiciary of the House of Representatives, which was adopted by the Senate Committee on the Judiciary, in dealing with the bill proposing to enact Chapter X, the subject was carefully considered. . ."

Here the opinion quotes from the Report of the House Judiciary Committee which is above set forth, and it is declared:

"We are of the opinion that the Committee's points are well taken and that Chapter X is a valid enactment. The statute is carefully drawn so as not to impinge upon the sovereignty of the State. The State retains control of its fiscal affairs. The bankruptcy power is exercised in relation to a matter normally within its province and only in a case where the action of the taxing agency in carrying out a plan of composition approved by the bankruptcy court is authorized by state law. It is of the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power."

Arguing by analogy from treaties and conventions in the International field by which governments yield their freedom of action in order to gain benefits from international accord, it was said:

"The reservation to the States by the Tenth Amendment protected, and did not destroy, their right to make contracts and give consents where that action would not contravene the provisions of the Federal Constitution. The States with the consent of Congress may enter into compacts with each other and the provisions of such compacts may limit the agreeing States in the exercise of their respective powers. . . The State is free to make contracts with individuals and give consents upon which the other contracting party may rely with respect to a particular use of governmental authority. . . while the instrumentalities of the national government are immune from taxation by a State, the State may tax them if the national government consents . . . and by a parity of reasoning the consent of the State could remove the obstacle to the taxation by the federal government of state agencies to which the consent applied.

"Nor did the formation of an indestructible Union of indestructible States make impossible cooperation between the Nation and the States through the exercise of the power of each to the advantage of the people who are citizens of both."

Reference was made to the recent decisions on the Social Security Act in which an attack on that legislation was based, among other things, on the ground that the deposit of the Unemployment Trust Fund with the Secretary of the Treasury to be invested until they were needed to meet current withdrawals. Attention was called to the fact that the Court declared that

contention to be unsound. From the opinion in that case the following was quoted:

"Nowhere in our scheme of government—in the limitations express or implied of our federal constitution—do we find that she [the State] is prohibited from assenting to conditions that will assure a fair and just requital for benefits received."

Summarizing the situation and declaring the consequences of the application of the principles of law discussed, the CHIEF JUSTICE said:

"In the instant case we have cooperation to provide a remedy for a serious condition in which the States alone were unable to afford relief. Improvement districts, such as the petitioner, were in distress. Economic disaster had made it impossible for them to meet their obligations. As the owners of property within the boundaries of the district could not pay adequate assessments, the power of taxation was useless. The creditors of the district were helpless. The natural and reasonable remedy through composition of the debts of the district was not available under state law by reason of the restriction imposed by the Federal Constitution upon the impairment of contracts by state legislation. The bankruptcy power is competent to give relief to debtors in such a plight and, if there is any obstacle to its exercise in the case of the districts organized under state law it lies in the right of the State to oppose federal interference. The State steps in to remove that obstacle. The State acts in aid, and not in derogation, of its sovereign powers. It invites the intervention of the bankruptcy power to save its agency which the State itself is powerless to rescue. Through its cooperation with the national government the needed relief is given. We see no ground for the conclusion that the Federal Constitution, in the interest of State sovereignty, has reduced both sovereigns to helplessness in such a case."

The opinion concludes with the statement that since the Bankruptcy power may be exerted to give effect to a plan for the composition of the debts of an insolvent debtor, there is no merit to the bondholders objection that the act violates the Fifth Amendment.

Argument of the case was opened by the Honorable Hatton W. Sumners, Chairman of the Committee on the Judiciary of the House of Representatives of the United States as *amicus curiae*, by special leave of court. Mr. Solicitor General Jackson argued for the United States, Mr. Guy Knupp and Mr. James R. McBride argued for the Irrigation District, and Mr. W. Coburn Cook and Mr. Charles L. Childers for the objecting bondholders.

Federal Statutes—The Rules of Decision Act—Its Application in Equity Suits

The rule announced in Erie Railroad Co. v. Tompkins (No. 367, decided April 25, 1938) requiring the federal courts, in diversity of citizenship cases, to follow the state law whether embodied in statute or judicial decision, is applicable to suits in equity as well as to actions at law.

Ruhlin et al. v. New York Life Insurance Co., 82 Adv. Op. 823; 58 Sup. Ct. Rep. 860.

This opinion reviews a judgment in a suit in equity brought to rescind disability and double indemnity provisions of a life insurance policy on the ground of misrepresentations.

The bill alleged that the plaintiff was a mutual life insurance company incorporated in New York and engaged in business in Pennsylvania; that the defendants were living temporarily in Pennsylvania, though plaintiff did not know their legal residence. It was alleged also that the plaintiff wrote two policies on the life of Ruhlin, one for $10,000 and one for $5,000 in December, 1928, and that in July, 1930, it wrote three more policies, each for $4,000. Allegations were made also that false and fraudulent representations were made by the insured in procuring the insurance. It was alleged also that on November 1, 1934, the insured presented a claim for total and permanent disability benefits under all the policies. The Insurance Company tendered into Court the sum of the premiums for the disability and double indemnity benefits and prayed for recission of such provisions.

The defendant moved to dismiss, asserting that the suit to rescind could not be maintained in view of the two-year incontestability clause, since more than two years had elapsed. That clause reads:

"Incontestability—This Policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits."

The court overruled the motion to dismiss on the ground that the clause, by its express language, had no application to disability and double indemnity benefits. The Circuit Court of Appeals affirmed.

On certiorari the decree was reversed by the Supreme Court in an opinion by MR. JUSTICE REED. In this opinion it is pointed out that since the proper construction of insurance contracts is a question of general commercial law, the case might have followed a different course in the lower courts, had *Erie Railroad Co. v. Tompkins*, No. 367, decided April 25, 1938, (reviewed herewith) been announced earlier. In this connection MR. JUSTICE REED pointed out that the rejection of the rule of *Swift v. Tyson* announced in *Erie Railroad Co. v. Tompkins* applies also in suits in equity, and added:

"Had *Erie Rairoad v. Tompkins* been announced at some prior date the course of this case might have been different. This Court might not have issued a writ of certiorari. Rule 38(5) of the Supreme Court Rules indicates that this Court will consider, as a reason for granting a writ of certiorari, the fact that 'a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter.' Since jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given to this Court in order 'to secure uniformity of decision,' . . . a showing of a conflict of circuits on a matter concerning which the federal courts had never denied their right to independent judgment prompted this Court to grant the writ. . . As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts. The Rules indicate that the Court will be persuaded to grant certiorari where a circuit court of appeals 'has decided an important question of local law in a way probably in conflict with applicable local decisions.' No such showing was attempted by the petition. Nor was it contended that the decision below was 'probably untenable' and therefore probably in conflict with the state law as yet unannounced by the highest court of the State.

"No decision at the present time could reconcile any 'conflict of circuits,' or do more than enunciate a tentative rule to guide particular federal courts. Therefore, even assuming that it is adequately presented on the record, we decline to decide the issue of state law. However, we shall not dismiss the writ of certiorari as improvidently granted. In view of the fact that the question in the case was regarded below, both by the courts and by counsel, as one of 'general' or 'federal' law, the interest of justice requires that the judgment be vacated and the cause remanded for the enforcement of the applicable principles of state law."

In conclusion, the Court made the following statement as to the effect of *Erie Railroad Co. v. Tompkins* in its practical application, a statement which should

do much to dispel doubts which have troubled those who may have read into the Erie case, conclusions not therein expressed:

"Application of the 'State law' to the present case, or any other controversy controlled by *Erie R. Co. v. Tompkins*, does not present the disputants with duties difficult or strange. The parties and the federal courts must now search for and apply the entire body of substantive law governing an identical action in the state courts. Hitherto, even in what were termed matters of 'general' law, counsel had to investigate the enactments of the state legislature. Now they must merely broaden their inquiry to include the decisions of the state courts, just as they would in a case tried in the state court, and just as they have always done in actions brought in the federal courts involving what were known as matters of 'local' law."

MR. JUSTICE CARDOZO took no part in the case*

The case was argued by Mr. Charles H. Sachs for the petitioners, and by Mr. William H. Eckert for the respondent.

State Statutes—Protection to Buyer Paying Record Owner for Oil

The Louisiana Act of 1934, protecting the purchaser of oil from claims by third persons, if payment is made to one who drilled and sold it under a lease from the last record owner, is found to constitute no deprivation of the purchaser's property, and, as applied, to require no decision of a federal constitutional question.

Arkansas Fuel Oil Co. v. Louisiana ex rel. Muslow, 82 Adv. Op. 854; 58 Sup. Ct. Rep. 832.

In this case the appellant challenged the validity of Act 64 of 1934 of Louisiana on the ground that the Act, if enforced in the manner relied on, would require the appellant to pay to the appellee the value of property which did not belong and never has belonged to appellee, thereby leaving the appellant liable to the true owner of the property for the value thereof. It was asserted that this would violate the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution.

The Act in question provides that a purchaser of oil can extinguish the indebtedness therefor as against all other parties, by paying the person who drilled and sold it under a lease from the last "record owner," if the required conveyance is sufficient to pass title in Louisiana, in the absence of any suit filed to test title, or notice by registered mail of the filing of such suit. Section 3 of the Act authorized purchasers to delay payments for previous purchases until a lapse of sixty days after the effective date of the Act, August 1, 1934, and denied protection to purchasers who paid the last record owner before the expiration of such period. The Louisiana Court of Appeals ruled that the sixty-day period was valid as a short statute of limitations against possible non-record owners. The Louisiana Court of Appeals allowed an appeal to the Federal Supreme Court where, in an opinion by MR. JUSTICE BLACK, the judgment below was affirmed.

It appeared that in 1927 Ackerman Oil Company, by its president and secretary, executed a deed to Best and Spurr which was duly recorded. April 18, 1933, Best and Spurr leased to Muslow, the appellee, under a lease whereby the owners would receive one-eighth of the oil produced and Muslow, seven-eighths. Muslow entered upon the leased property and produced oil and sold it to The Louisiana Oil Refining Corporation. The appellant succeeded to the latter company's assets after a reorganization under Section 77B of the Bankruptcy Act. Muslow demanded payment of the appellant for oil delivered between July, 1933, and September, 1934. The appellant answered and did not deny that it owed someone $445.00 for the oil, but challenged the conveyance to Best and Spurr for lack of consideration and lack of authority of the corporate officers to make the conveyance. The State Courts ruled against the appellant on these points. It described the purpose of the statute as follows:

"We experience little difficulty in determining the legislative intent in adopting this Act. It supplied a long felt need, and in its operative effect will serve to prevent imposition upon and unjust discrimination against those whom it was intended to protect. The Act establishes a rule of conduct for the protection of lessors, their assignees, under oil and gas leases, and also a rule of security and safety for lessees and those holding under or purchasing from them. . . The Act was designed also to protect those persons whose rights arose from or are based upon contracts with the last record owner of the land covered thereby, and to those who deal with or acquire from such persons."

On the appeal to the Supreme Court MR. JUSTICE BLACK found it unnecessary to decide any federal constitutional question, since the only suggestion made by the appellant, as to any one not of record, was that the property belonged to the State of Louisiana. Since its courts had sustained the Act and had denied recourse against the buyer by any third person, no violation of appellant's property rights was found. In this connection MR. JUSTICE BLACK states:

"Appellant seeks to escape payment to Muslow for the oil which it purchased in 1934 on the ground that such payment would not discharge the indebtedness to a 'true owner'—alleged to be the State of Louisiana. The Louisiana Court of Appeals speaking in this case has declared that the statute 'protects the purchaser in paying the price to the one from whom the oil has been purchased; and *under the express declarations of the Act*, no recourse may thereafter be had by any third person or adverse claimant against such buyer.' Since no adverse claimant to the land has appeared in eleven years, it is clear under all the circumstances of this case that payment for the oil bought from Muslow in 1933 and 1934 will not deprive appellant of any rights under the Federal Constitution."

MR. JUSTICE STONE concurred in the result.

The case was argued by Mr. Robert Roberts, Jr. for the appellant, and by Mr. John B. Files for the appellee.

Limitation of Actions—Bar to Action by Foreign Sovereign

In an action at law brought in a federal district court by a foreign sovereign, the statute of limitations of the state wherein the court is sitting may be pleaded and enforced against such foreign sovereign, though it would not be a good defense against the domestic sovereign. Where an assignment of the cause of action has been taken by the United States from the foreign sovereign, after the statute of limitations has run, the statute of limitations is a good defense in an action brought by the United States on the cause of action assigned.

Guaranty Trust Co. of New York v. United States, 82 Adv. Op. 800; 58 Sup. Ct. Rep. 785.

This case involved questions as to the right of recovery by the United States of moneys deposited with the petitioner by the Imperial Russian Government. On July 15, 1916, that Government opened an account with the petitioner, a New York corporation. On the

*MR. JUSTICE CARDOZO took no part in the decisions of any of the cases reviewed or summarized in this issue.

following March 16th, the Imperial Government was overthrown and was succeeded by the Provisional Government of Russia, which was recognized by the United States March 22, 1917. July 5, 1917, Bakhmeteff was recognized by the President as the Russian Ambassador. Shortly thereafter the financial agent of the Russian Embassy deposited $5,000,000 in the account. Later, on November 7, 1917, the Provisional Government was overthrown and was succeeded by the Soviet Government at which time about $5,000,000 was still on deposit. November 28th, the Soviet Government dismissed Bakhmeteff and also the Financial Attache. However, the United States continued to recognize Bakhmeteff until June 30, 1922, when he withdrew. It continued to recognize the Financial Attache until November 16, 1932, at which time the Soviet Government was recognized. On recognition of the latter by the United States, the Soviet Government made an assignment to the United States of moneys due it as the successor of prior Russian Governments from American nationals, including corporations. The United States then made demand on the petitioner for the amount on deposit. The demand was refused and suit followed in the United States District Court for Southern New York. The petitioner moved to dismiss the suit on the ground that recovery was barred by the New York six-year statute of limitations. In support of its motion it submitted affidavits, depositions, and other proof tending to show that on February 25, 1918, it had applied the balance of the account as a credit against indebtedness due it by the Russian Government because of the latter's seizure of certain ruble deposit accounts which the petitioner had in Russian private banks. Counter affidavits were submitted also, and the District Court found that the petitioner had repudiated liability on the account on February 25, 1918. The Circuit Court of Appeals reversed the judgment for petitioner, taking the view that the local statute of limitations did not run against a foreign sovereign. On certiorari this was reversed by the Supreme Court in an opinion by MR. JUSTICE STONE.

Three questions were considered: (1) Is a foreign government subject to a local statute of limitations in a suit in a federal district court; (2) Does an assignment by a foreign sovereign to the United States override or restrict the operation of the statute of limitations; (3) Did the non-recognition of the Soviet Government for 16 years affect the running of the statute.

The Government contended: (1) That a foreign sovereign is not barred by a local statute of limitations, and that its immunity is an implied exception to the statute of limitations and to the Conformity Act; (2) that suit could not have been maintained by the Soviet Government prior to its recognition and that, consequently, since the statute does not run when suit cannot be brought, the present suit is not barred; (3) that the statute of limitations does not extinguish the right but merely bars the remedy, and hence the United States was not barred even if the Soviet Government was; (4) that the statute of limitations is inoperative because its application would impede the execution of the agreements by the governments by which the assignment was effected; and (5) that the notice of the repudiation was ineffective to set the statute of limitations running.

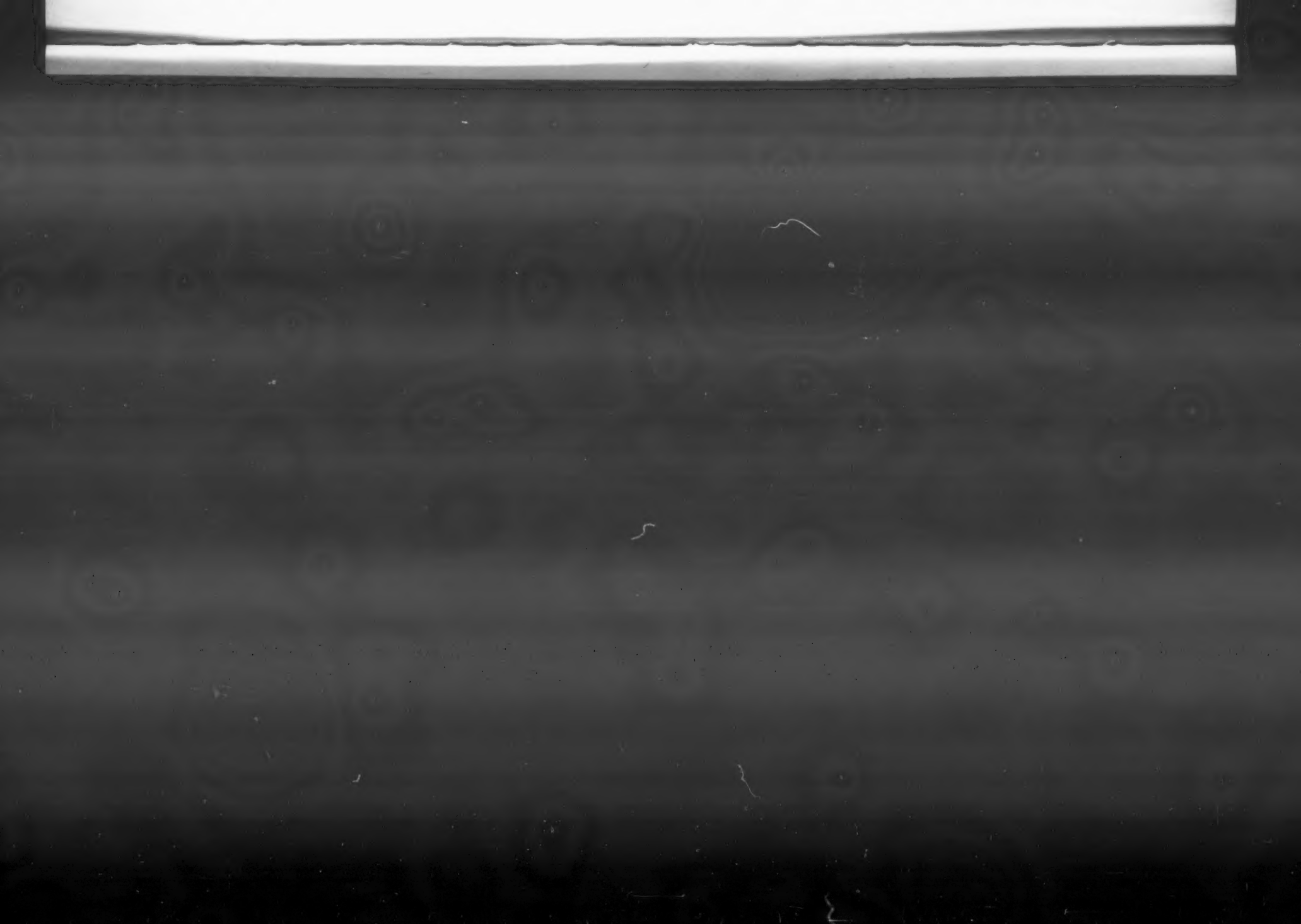
In discussing these various contentions, Mr. Justice Stone first observed that the exemption of the sovereign from the statute of limitations does not depend solely upon the existence of the royal prerogative, but has its justification in a public policy designed to protect the public revenues and property from loss by the negligence of public officials. Whether the benefit of the immunity should be extended to a foreign sovereign suing in a state or federal court was a question as to which the authorities were found to give no conclusive answer. It was observed in this connection that while, upon the principle of comity, a foreign government may not be sued in our courts without its consent, different considerations are present where the foreign sovereign seeks a remedy in our courts. A review of these considerations led to the conclusion that the rule of exemption should not be applied in favor of a foreign sovereign. As to this, MR. JUSTICE STONE said:

"It is true that upon the principle of comity foreign sovereigns and their public property are held not to be amenable to suit in our courts without their consent. . . But very different considerations apply where the foreign sovereign avails itself of the privilege, likewise extended by comity, of suing in our courts. . . By voluntarily appearing in the role of suitor it abandons its immunity from suit and subjects itself to the procedure and rules of decision governing the forum which it has sought. Even the domestic sovereign by joining in suit accepts whatever liabilities the court may decide to be a reasonable incident of that act. . . As in the case of the domestic sovereign in like situation, those rules, which must be assumed to be founded on principles of justice applicable to individuals, are to be relaxed only in response to some persuasive demand of public policy generated by the nature of the suitor or of the claim which it asserts. That this is the guiding principle sufficiently appears in the many instances in which courts have narrowly restricted the application of the rule of *nullum tempus* in the case of the domestic sovereign. It likewise appears from those cases which justify the rule as applied to the United States suing in a state court, on the ground that it is sovereign within the state and that invocation of the rule *nullum tempus* protects the public interest there as well as in every other state. . .

"We are unable to discern in the case where a foreign sovereign, by suit, seeks justice according to the law of the forum, any of the considerations of public policy which support the application of the rule *nullum tempus* to a domestic sovereign. The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time. It has long been regarded by this Court and by the courts of New York as a meritorious defense, in itself serving a public interest. . . Denial of its protection against the demand of the domestic sovereign in the interest of the domestic community of which the debtor is a part could hardly be thought to argue for a like surrender of the local interest in favor of a foreign sovereign and the community which it represents. We cannot say that the public interest of the forum goes so far.

"We lay aside questions not presented here which might arise if the national government, in the conduct of its foreign affairs, by treaty or other appropriate action, should undertake to restrict the application of local statutes of limitations against foreign governments, or if the states in enacting them should discriminate against suits brought by a foreign government. We decide only that in the absence of such action the limitation statutes of the forum run against a foreign government seeking a remedy afforded by the forum, as they run against private litigants."

Next considered was the contention that until recognition of the Soviet Government there was no person to whom notice of repudiation could be given by petitioner to start the running of the statute, and no court in which suit could be maintained to recover the



deposit. As to this phase of the case, the Court noted that it was not denied that the Soviet Government had no standing to sue until recognized by the political department of the government. But, it was pointed out that recognition of the Provisional Government during the period continued and that the courts were open to its representatives to bring suits on its behalf. It was thought, moreover, that the later recognition of the Soviet Government did not operate to nullify all the legal transactions of the prior Provisional Government. Rejecting the Government's argument that the recognition of the Soviet Government nullified the consequences of the earlier recognition of the Provisional Government, MR. JUSTICE STONE stated the conclusion of the Court on this point, as follows:

"The very purpose of the recognition by our Government is that our nationals may be conclusively advised with what government they may safely carry on business transactions and who its representatives are. If those transactions, valid when entered into, were to be disregarded after the later recognition of a successor government, recognition would be but an idle ceremony, yielding none of the advantages of established diplomatic relations in enabling business transactions to proceed, and affording no protection to our own nationals in carrying them on.

"So far as we are advised no court has sanctioned such a doctrine. The notion that the judgment in suits maintained by the representative of the Provisional Government would not be conclusive upon all successor governments, was considered and rejected in *Russian Government v. Lehigh Valley R. Co.*, 21 F (2d) 396. An application for writ of prohibition was denied by this Court. 265 U. S. 573. We conclude that the recognition of the Soviet Government left unaffected those legal consequences of the previous recognition of the Provisional Government and its representatives, which attached to action taken here prior to the later recognition."

Attention was also given to the Government's contention that the assignment to the United States prevents the operation of limitation. In dealing with this contention, the opinion was expressed that any discussion of the distinction between rights and remedies was unnecessary, since the Court assumed that whatever rights were acquired by the assignment survived after the running of the statute against the Soviet Government and that the Government may assert those rights subject to such plea of limitations as may be made by the petitioner. In adopting this view, emphasis was placed upon the fact that the statutory period of limitation had expired before the assignment was made. It was felt, therefore, that such rights as the United States acquired were taken with the existing infirmity. In analysis of this contention, MR. JUSTICE STONE said:

"The question is whether the exemption of the United States from the consequences of the neglect of its own agents is enough to relieve it from the consequences of the Russian Government's failure to prosecute the claim. Proof, under a plea of limitation, that the six-year statutory period had run before the assignment offends against no policy of protecting the domestic sovereign. It deprives the United States of no right, for the proof demonstrates that the United States never acquired a right free of a preexisting infirmity, the running of limitations against its assignor, which public policy does not forbid."

The Court observed further that even if it be assumed that the rights of the respective parties could have been altered by the executive agreement, nothing in that agreement was found which purports to effect such alteration, and it was concluded that the assignment left unaffected petitioner's right to assert the prior running of the statute of limitations.

In conclusion, the Court stated that since the questions as to the effectiveness of repudiation were not passed on by the court below, the case should be remanded for further proceedings.

MR. JUSTICE REED did not participate in consideration of the case.

The case was argued by Mr. John W. Davis for the petitioner, and by Assistant Attorney General Whitaker for the respondent.

Administrative Law—Packers and Stockyards Act, 1921—Regulation of Marketing Agencies' Rates —Essentials of Fair Hearings

In a proceeding before the Secretary of Agriculture, to fix maximum rates to be charged by marketing agencies, wherein the Government is in the position of a party adverse to the agencies whose rates are involved, failure of the Government to specify its claims by complaint and to notify the agencies of its proposed findings, constitutes denial of a full and fair hearing.

It is essential to a fair hearing by an administrative body that a party thereto shall have the right to know the claims and contentions of an adverse party, and an opportunity to meet the same by argument.

Morgan et al. v. United States, 82 Adv. Op. 757; 58 Sup. Ct. Rep. 773.

In this case a question was presented as to the validity of an order of the Secretary of Agriculture fixing rates to be charged by market agencies at the Kansas City Stock Yards. A previous decision of the Supreme Court had ruled that the Secretary should be required to answer allegations to the effect that he had made the order without having heard or read the evidence, and without having heard or considered the arguments submitted.

At the second court hearing the course of the administrative hearing was shown by evidence. It appeared that the proceedings had been instituted originally in 1930, and that an order of a former Secretary, issued as a result thereof, had been set aside by the Secretary, because of changed economic conditions. A new order was made June 14, 1933. The opinion deals with the validity of this latter order.

The record disclosed that about 10,000 pages of transcript of oral evidence and over 1,000 pages of statistical exhibits were before the Secretary. The evidence had been taken prior to the time the Secretary himself took office, and he did not hear the oral arguments. He concluded that the essence of the evidence was probably in the appellants' briefs, and these, with the transcript of oral testimony, he took home and read. He had several conferences with the Solicitor of the Department, and with officials of the Bureau of Animal Industry. That Bureau prepared findings, 180 in number, which were elaborate and dealt with numerous details of the appellants' business. The Secretary testified that the order represented his "independent conclusion as based on the findings of the men in the Bureau of Animal Industry." These findings he accepted, save for certain rate alterations.

In concluding that the order was invalid the Supreme Court, in an opinion by MR. CHIEF JUSTICE HUGHES, states that it assumed that the Secretary understood the purport of the evidence. It emphasized, however, that this was not sufficient, since a fair hearing includes the right to know what the adversary's contentions are and an opportunity to meet them, and that these were lacking. Dealing with this aspect of the case the opinion states:

"The first question goes to the very foundation of the action of administrative agencies entrusted by the Congress

with broad control over activities which in their detail cannot be dealt with directly by the legislature. The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand "a fair and open hearing,"—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.' . . .

"In the light of this testimony there is no occasion to discuss the extent to which the Secretary examined the evidence, and we agree with the Government's contention that it was not the function of the court to probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing which the law required. The Secretary read the summary presented by appellants' briefs and he conferred with his subordinates who had sifted and analyzed the evidence. We assume that the Secretary sufficiently understood its purport. But a 'full hearing'—a fair and open hearing—requires more than that. The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

After discussing the failure to accord the appellants an adequate statement of the Government's claims, the Court pointed to the analogy to judicial requirements in equity in hearings before a special master, and emphasized that the requirements of fairness extend to all steps in the proceedings, saying:

"Congress, in requiring a 'full hearing,' had regard to judicial standards,—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. If in an equity cause, a special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing. The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps."

In conclusion, stress was placed on the importance of maintaining proper standards as to fair hearings to enable administrative agencies to accomplish their purposes. With reference to this, MR. CHIEF JUSTICE HUGHES said:

"The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

MR. JUSTICE BLACK dissented, without opinion.

MR. JUSTICE REED took no part in the decision of the case.

The case was argued by Messrs. Frederick H. Wood and John B. Gage for the appellants, and by Solicitor General Jackson and Mr. Wendell Berge for the appellee.

Compacts Between States — Apportionment of Waters of Interstate Streams

The states may, by a compact entered into with the consent of Congress, make provision for the equitable apportionment of an interstate stream flowing through their territories.

Such a compact is not invalid because it apportions to one state less water than has previously been appropriated by it and awarded to its citizens, since neither state can grant to its citizens more water than the state itself is entitled to appropriate.

The rights of citizens of a state to water in such a stream are subject to the power of the state, by compact, to provide for equitable division of the waters with other states.

Hinderlider v. The La Plata and Cherry Creek Ditch Co., 82 Adv. Op. 774; 58 Sup. Ct. Rep. 803.

This case involved a question as to the validity and effect of the La Plata River Compact between Colorado and New Mexico, providing for the apportionment of the water of that river between the two States.

The appellee is a Colorado corporation which owns a ditch by which it diverts water from the La Plata River in Colorado for irrigation. In 1928, it sued in a local court for a mandatory injunction, complaining that the defendants, the appellants, who are the State Engineer of Colorado and his subordinates, had administered the water in the river in a manner depriving the appellee of its water rights.

The defendants admitted that they had shut the head gate of the Ditch Company during named periods and thereby had deprived the Ditch Company of water, but asserted that their action was in accordance with the requirements of the Compact, which the States had made with the consent of Congress. The Compact provides that each State shall receive a certain share of water under the varying conditions which exist throughout the year. It prescribes that between December 1st and the following February 15th each State shall have the unrestricted right to use all water flowing between its boundaries; but that between February 15th and December 1st of each year, the water shall be apportioned between the States as follows: "(a) Each State shall have the unrestricted right to use all the waters within its boundaries in each day when the mean daily flow at the interstate station is one hundred cubic feet per second, or more," and that "(b) On all other days, the State of Colorado shall deliver at the interstate station a quantity of water equivalent to one-half of the mean flow at the Hesperus station for the preceding day, but not to exceed one hundred cubic feet per second." It also provides that, whenever the flow of the river is so low that, in the judgment of the State Engineers, the greatest benefit of the water may be secured by distributing all of the water successively to each State in alternating periods in lieu of the delivery set forth above, the use of the waters may be rotated between the States in such manner for such periods as the State Engineers may jointly determine.

The Engineers agreed that in the summer months of 1928, when the river was very low, that the whole

available supply should be rotated between the two States so that during alternating ten-day periods each State would enjoy the entire flow of water.

In both States the water of the river has long been used for irrigation and both States have adopted the apportionment doctrine of water use, under which the first person who acts towards diversion of water from a natural stream in the application of such water to a beneficial use has the first right, if he diligently continues his enterprise to completion and beneficially applies the water. Subsequent appropriations are subject to rights already held in the stream.

The rights of all claimants to divert in Colorado were adjudicated in a proceeding under Colorado statutes by which, under a decree of January 12, 1898, the Ditch Company was declared entitled to divert 39¼ cubic feet per second subject to senior priorities aggregating 19 cubic feet. In June, 1928, there were 57 second feet of water in the stream and the Ditch Company claimed that by reason of the decree of 1898 it was entitled to all the waters in the stream except that necessary to satisfy the Colorado priorities. If it had been permitted to withdraw all the water it claimed, none would have been available to New Mexico claimants who, under similar laws, had made appropriations, some of them earlier in date than the Ditch Company's claim.

The case was first tried in 1930 and the trial court sustained the action of the water officials, under the terms of the Compact. On appeal, the State Supreme Court ruled that the Compact was no sufficient defense. An appeal to the United States Supreme Court was later dismissed for want of a final decree below. The case was then retried on the same pleadings and evidence, and a decree was entered declaring that the Compact was not a defense to the actions of the water officials, and directing the water officials to permit the diversion through the plaintiff's headgate in accordance with the decree of 1898. The second judgment was affirmed by the State Supreme Court.

On appeal to the Federal Supreme Court, in an opinion by MR. JUSTICE BRANDEIS, that Court ruled that the case was not reviewable on appeal, but that it did present a federal question reviewable on certiorari. Because of its importance certiorari was granted, and the judgment reversed. Pursuant to the Act of Congress of August 24, 1937, the attention of the Attorney General of the United States was called to the contention that the validity of a federal statute was involved.

At the outset MR. JUSTICE BRANDEIS called attention to the rule which has been established regarding the equitable apportionment in each state of waters flowing from one state into another. The decision appealed from was found to ignore that rule. In an analysis of the proper application of that rule to the conditions involved here, the Court assumed that the rights adjudicated by the decree of 1898 are property rights of the Ditch Company, indefeasible so far as it concerns Colorado and other persons claiming water rights there. But it denied that that decree could confer upon the Ditch Company rights in excess of Colorado's share of the water. In this connection, the Court said:

"As the La Plata River flows from Colorado into New Mexico and in each State the water is used beneficially, it must be equitably apportioned between the two. The decision below in effect ignores that rule. It holds immaterial the fact that the acts complained of were being done in compliance with the Compact, and does so on the ground that the Compact in authorizing diversion and rotation violated rights awarded by the January 12, 1898 decree in the Colorado water proceeding; holds that the decree awarded to the Ditch Company the right to divert from the river 39¼ cubic feet per second (subject only to the senior Colorado priorities of 19 second feet), even if by so doing it exhausts the whole flow of the stream and leaves nothing for the New Mexico claimants; and holds that the right so awarded is a vested property right which the two States, although acting with the consent of the United States, lacked power to diminish or modify except by a condemnation proceeding and payment of compensation. No such proceeding was provided for in the Compact and none was had otherwise.

"It may be assumed that the right adjudicated by the decree of January 12, 1898 to the Ditch Company is a property right, indefeasible so far as concerns the State of Colorado, its citizens, and any other person claiming water rights there. But the Colorado decree could not confer upon the Ditch Company rights in excess of Colorado's share of the water of the stream; and its share was only an equitable portion thereof.

"The claim that on interstate streams the upper State has such ownership or control of the whole stream as entitles it to divert all the water, regardless of any injury or prejudice to the lower State, has been made by Colorado in litigation concerning other interstate streams, but has been consistently denied by this Court."

Attention was then directed to the view of the State Supreme Court that the Compact was unconstitutional because it embodied no judicial decision of controverted rights, and was a mere trading compromise of conflicting claims. But MR. JUSTICE BRANDEIS declared that a judicial or quasi-judicial decision of the claims in such cases is not essential, since the Constitution provides two means of adjusting interstate controversies, (a), the legislative method, through a compact which is an adaption of the treaty making power of sovereigns; and (b), the judicial method, by suit in the Supreme Court. The history of the two methods and the superiority of the legislative method in certain circumstances were briefly reviewed in the following portion of the opinion:

". . . The compact—the legislative means—adapts to our Union of sovereign States the age-old treaty making power of independent sovereign nations. Adjustment by compact without a judicial or quasi-judicial determination of existing rights had been practiced in the Colonies, was practiced by the States before the adoption of the Constitution, and had been extensively practiced in the United States for nearly half a century before this Court first applied the judicial means in settling the boundary dispute in *Rhode Island v. Massachusetts*, 12 Pet. 657, 723-25.

"The extent of the existing equitable right of Colorado and of New Mexico in the La Plata River could obviously have been determined by a suit in this Court, as was done in *Kansas v. Colorado* 206 U. S. 46, in respect to the Laramie. But resort to the judicial remedy is never essential to the adjustment of interstate controversies, unless the States are unable to agree upon the terms of a compact, or Congress refuses its consent. The difficulties incident to litigation have led States to resort, with frequency, to adjustment of their controversies by compact, even where the matter in dispute was the relatively simple one of a boundary. In two such cases this Court suggested 'that the parties endeavor with the consent of Congress to adjust their boundaries.' . . In *New York v. New Jersey*, 256 U. S. 296, 313, which involved a more intricate problem of rights in interstate waters, the recommendation that treaty-making be resorted to was more specific; and compacts for the apportionment of the water of interstate streams have been common."

The Court noted further that whether the apportionment of water in an interstate stream is made by compact or by judicial decree of the Supreme Court,

the apportionment is binding upon all water claimants in each state, even in a case where the state has granted water rights before it entered into the compact. Prior decisions were cited in support of this view. Since the States had power to bind their various appropriators through division of the flow of the stream, their right to provide for alternate periods of flow of all the water to one State and to the other was thought equally clear. Nor was any abuse of authority by the engineers found, nor any improper delegation of power to them.

In conclusion the Court expressed its opinion that the assent of Congress to a compact between States does not make it a treaty or statute of the United States within the meaning of Section 237 (a) of the Judicial Code, and that the appeal consequently should be dismissed. However, since the injunction against the State Engineer enjoining him from taking action by the Compact denied an important claim under the Constitution, review by certiorari was allowed.

The case was argued by Messrs. Byron G. Rogers and Ralph L. Carr for the appellant, and by Mr. Charles J. Beise for the appellee.

Public Utilities—Regulation of Rates—Equitable Relief Against Investigation

Where the public service commission of a state undertakes to investigate the rates charged by a company which produces natural gas and sells to public utilities companies, and the producing company seeks an injunction in a federal court restraining the commission from conducting the investigation on the ground that its rates are not subject to the commission's regulatory power and that the investigation will impose irreparable injury on the company by reason of the irrecoverable expense involved, the injunction will be denied. The necessity for the company to make expenditures for the investigation or take the risk of penalties for non-compliance is not an irreparable injury of the sort which entitles the complainant to equitable relief.

Petroleum Exploration, Inc. v. Pub. Service Comm. of Ky., 82 Adv. Op. 827; 58 Sup. Ct. Rep. 834.

This case originated on a bill brought by the appellant to enjoin the Public Service Commission of Kentucky from investigating wholesale rates for gas sold under contract in Kentucky by the appellant to its customers, on the ground that a regulation of rates was beyond the power of the Commission, since the appellant is not a public utility. The appellant is a Maine corporation engaged in producing and purchasing natural gas in Kentucky, and transmitting the gas through intrastate pipe lines to distributing agents at the "city gates" of various municipalities in Kentucky. It sells to three distributing agencies: a partnership, a corporation independent of the appellant, and a corporation in which the appellant owns a dominant interest. It sells by separate contracts only, to the distributing agencies named in the bill. The distributing agencies own unexpired franchises in the respective municipalities. The retail rates for the gas are fixed by the franchises or by supplementary contract. The Public Service Commission by an order of May 29th, 1937, undertook an investigation of the rates, and directed the appellant to appear at the hearing of evidence of the reasonableness of its rates and charges and also to make its records available for examination. The appellant filed a plea to the Commission's jurisdiction, but its objections were overruled and the investigation was reset for hearing on the merits. The appellant then filed its bill in the federal district court for an injunction to restrain the Commission from proceeding further.

The bill alleged that the Commission's purpose was to lower the appellant's rates, that the rates were not subject to the Commission's regulatory power, and that any reduction would violate the Fourteenth Amendment and impair the obligations of its contracts in violation of both Federal and State Constitutions. It alleged further that the investigation and orders entered in it were unlawful and unreasonable and, if further prosecuted, would put the appellant to considerable and needless expense. The Commission answered, asserting that the appellant was subject to its regulatory power and denied any purpose on its part to lower the contract price fixed by the appellant's contracts with its distributing agencies. The commission alleged further that it would institute a special investigation to determine a fair and reasonable rate to be charged by the appellant and to fix such rate.

The District Court, composed of three judges, under Judicial Code Section 266, ruled that, as the challenged order could be enforced only by judicial proceedings, there was no immediately threatened irreparable injury to the appellant within its equity jurisdiction. Without considering the merits, it dismissed the bill. On appeal this was affirmed by the Supreme Court in an opinion by MR. JUSTICE REED.

The first point considered was the contention of the Commission that an injunction is prohibited by the Johnson Act of 1934. That Act withdraws jurisdiction from the district courts over any suit to enjoin enforcement of an order of a state administrative commission where the order: (1) affects rates charged by a public utility, (2) does not interfere with interstate commerce, (3) has been made after notice and hearing and where an adequate remedy may be had at law or in equity in the state courts. MR. JUSTICE REED expressed the view that that Act has no application here because the order in question was without notice and hearing. In this connection the opinion pointed out that although it was entitled "a notice of investigation and order to show cause," yet in fact the order directed the appellant to produce evidence on a designated date, and was not merely an order to show cause why evidence should not be produced.

The question also was considered as to whether the matter in controversy exceeds $3,000. Since the purpose was to stop the investigation which would put the appellant to an alleged expenditure of $25,000, the Court was of the opinion that a sufficient showing had been made that the amount in the controversy exceeded $3,000.

Next considered was whether the suit should be dismissed under Section 267 of the Judicial Code which requires the denial of an injunction where a "plain, adequate and complete remedy may be had at law." In dealing with this Mr. Justice Reed observed that it is settled that no adequate remedy at law exists sufficient to deprive federal courts of equity jurisdiction, unless such remedy is available in the federal courts. Since, upon analysis, it was found that adequate legal remedy does not exist here in the federal courts, the Court concluded that the District Court had equitable jurisdiction, if the order threatened imminent irreparable injury.

With these questions disposed of, the Court approached the more fundamental question as to whether the fact that the prosecution of the investigation would

entail considerable irrecoverable expense to the appellant constituted an irreparable injury against which equitable relief would be afforded. In this connection, the Court emphasized that there is no constitutional immunity from giving information appropriate to a legislative or judicial inquiry, that the issuance of equitable relief is in the sound discretion of the Court and, finally, that certain expenses of litigation are an inescapable burden of living under government. In discussion of these considerations, MR. JUSTICE REED said, in part:

"It is not suggested that the expense is disproportionate to the business of appellant, valued by the District Court as in excess of $1,500,000, and involving sales of about one billion cubic feet per annum, at a price of $350,000. No order has been entered fixing rates or regulating conduct. The necessity to expend for the investigation or to take the risk for noncompliance does not justify the injunction. It is not the sort of irreparable injury against which equity protects.

"The weight to be given complaints of irrecoverable and irreparable cost and damage in proceedings to enjoin hearings, initiated by a federal governmental agency in a matter alleged by complainants to be beyond the agency's powers, was considered in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. —, No. 181, October Term 1937, decided January 31, 1938. In an effort to enjoin hearings by the National Labor Relations Board, the Corporation alleged (see 303 U. S. —): 'that hearings would, at best, be futile; and that the holding of them would result in irreparable damage to the Corporation, not only by reason of their direct cost and the loss of time of its officials and employees, but also because the hearings would cause serious impairment of the good will and harmonious relations existing between the Corporation and its employees, and thus seriously impair the efficiency of its operations.' Further allegations pointed out similar substantial damages in preceding investigations. . . While other grounds were factors in our conclusion to reverse the decree for an injunction, we said (p. —): 'Lawsuits also often prove to have been groundless: but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact.'

"It may be suggested that in the *Bethlehem Shipbuilding* case the employer had not presented to the Board its contention of constitutional immunity, and that proof of that immunity would have constituted no greater injury if presented to the Board than the courts, whereas here the appellant has already been overruled by the Commission on the question of appellant's constitutional immunity, and so would be subject to greater expense by presenting further evidence on another matter before the Commission than by proceeding in an equity court and there contesting the Commission's jurisdiction. This was the argument presented to the Court, but not discussed, in *United States v. Illinois Central R. Co.*, 244 U. S. 82, 85-86. The situation is still controlled by the abiding and fundamental principle of this aspect of the *Bethlehem Shipbuilding* case, that the expense and annoyance of litigation is 'part of the social burden of living under government.' The authority in other courts is in accord."

In conclusion, the Court declared that the denial of the injunction here was strengthened by a balancing of conveniences. In illustration of this, the importance of maintaining the autonomy of the states was emphasized as against the burden imposed on the appellant of preparing for the hearing.

MR. JUSTICE MCREYNOLDS concurred in the result.

MR. JUSTICE STONE concurred, but expressed no opinion on the applicability of the Johnson Act.

The case was argued by Mr. W. J. Brennan for the appellant, and by Mr. J. W. Jones for the appellee.

Public Utilities—Validity of Order of State Commission Prescribing Maximum Rates

In a rate case before a state public service commission, brought to fix maximum rates for gas sold by a producing company to distributing companies, the commission properly included in the rate base certain properties of the producing company outside the state, where it appeared that the producing and distributing companies constitute an integrated system and are but different departments of the same enterprise, and where the commission did not undertake thereby to regulate sales of gas in interstate commerce.

Such a rate order of the commission is presumptively valid. But where it has been found confiscatory on a trial de novo before a jury, upon evidence as to value, operating expenses, revenues and rate of return on the basis of the integrated system adopted by the commission in fixing system value, the verdict and judgment of confiscation should not be set aside because the utility company failed to make a proper segregation of its interstate and intrastate properties and business, since the utility is entitled to attack the order on the system basis adopted by the commission in fixing value.

Lone Star Gas Co. v. State of Texas et al., 82 Adv. Op. 884; 58 Sup. Ct. Rep. 883.

This case deals with the validity of an order of the Texas Railroad Commission fixing maximum rates for gas supplied by the appellant to distributing companies in Texas. The appellant produces and purchases gas in Texas and Oklahoma and sells the same to distributing companies in Texas and, to some extent, in Oklahoma. The Commission's order reduced the maximum rate in Texas from 40c to 32c per thousand cubic feet. In a suit brought by the Commission in a county district court in Texas for enforcement of its rate order, the district court, on the verdict of a jury which found the rate unreasonable, denied relief and enjoined enforcement of the order. The Court of Civil Appeals reversed the judgment and sustained the order. On an appeal to the Supreme Court the judgment was reversed in an opinion by MR. CHIEF JUSTICE HUGHES.

The opinion details the proceedings before the Commission, the trial court, and the appellate court. It appeared that after the entry of the Commission's order, made after an extended hearing and on voluminous evidence, a trial *de novo* was had in the district court. At that trial additional evidence was introduced and motions by both parties for a directed verdict were denied. The jury, under a series of instructions embracing appropriate definitions of relevant terms, found that the rate fixed by the Commission was unreasonable and unjust to the appellant as applied to points in Texas. This finding was regarded as a finding, in substance, on the question whether the rate order was confiscatory. On appeal to the Court of Civil Appeals, that Court sustained the order against a challenge that it violated the appellant's rights under the commerce clause. The view of the Court of Civil Appeals on this point was affirmed by the Supreme Court. In affirming the ruling, Mr. Chief Justice Hughes points out that the Commission did not purport to regulate interstate transportation of gas, or its sales or deliveries in interstate commerce; that the distributing companies in Texas were, for the most part, affiliates of the appellant, and that the distributing companies and appellant are but departments of the same organization doing an intrastate business in Texas.

The Court notes also that some of the gas sold by the appellant to Texas distributing companies is produced

or purchased in Oklahoma, and that some is purchased or produced in the Panhandle section of Texas and moves a short distance through a pipe line across a corner of Oklahoma, back into Texas for distribution. Objection was made to the inclusion in the rate base of this pipe line from the Texas Panhandle. This objection, however, was rejected on the ground that the value of both the production properties in Texas and the transmission line were essential in determining the rate base. With reference to this, the opinion states:

"The fact that the line cut across a corner of Oklahoma did not make it any the less a part of the system serving Texas gas to communities in Texas. In ascertaining what would be a reasonable rate of charge for this Texas gas supplied to Texas consumers, it was not only fair but manifestly necessary to take into account the value of the production properties in Texas from which the gas was taken and also the value of the transmission line by which the gas was brought to the city gates of the Texas communities. It is futile to contend that in making its calculations on that basis, the Commission was regulating interstate transportation or imposing any burden upon interstate commerce. . . In seeking to assure a just determination of a reasonable charge for the sales and deliveries in the intrastate business in Texas, the State was protecting its local interests and its action was not in conflict with any federal regulation. . . .

"We think that the value of the pipe line from the Texas Panhandle field was properly included by the Commission in the rate base."

In support of the inclusion of the producing properties in Oklahoma and transmission lines in Texas, emphasis is placed upon the fact that in the treatment of the gas it is commingled with Texas gas and divided and redivided until it is impossible to trace or identify it by volume at any city gate of delivery, so that it becomes an integral part of the gas supply of the various communities in appellant's intrastate business. It is pointed out moreover that the inclusion of the producing properties in Oklahoma in calculating the rate base was not for the purpose of fixing a rate for Oklahoma deliveries, but rather to give proper credit to the appellant for its investment and operating expenses in determining the rate for gas sold in Texas.

The opinion then considers the issue of confiscation. In dealing with this issue the Court observes that the Court of Civil Appeals reversed the judgment upon a distinct ground, namely: that the appellant had failed to make "a proper segregation of interstate and intrastate properties and business." But the Supreme Court finds that it was error for the court below to make such segregation a criterion as to the sufficiency of the appellant's evidence. It points out that the Commission, in dealing with the property as an integrated operating system had not exceeded the State's jurisdiction or applied an improper criterion. In view of this conclusion, the Court points out that the appellant was entitled to attack the findings upon the same basis, and says:

"But if in the circumstances shown the Commission was entitled to make its findings with respect to appellant's property and business upon the basis it adopted in order to fix a fair rate for the sales and deliveries in Texas, appellant was entitled to assail those findings upon the same basis. If the findings of the Commission as to value and other basic elements were to be taken as presumptively correct and appellant could not succeed save by overcoming those determinations by clear and convincing proof, appellant could not be denied the right to introduce evidence as to its property and business as an integrated system and to have the sufficiency of its evidence ascertained by the criterion which the Commission had properly used in the same manner in reaching its conclusion as to the Texas rate. Neither the fact that appellant, because of the insistence of the State that the property and business should be segregated, finally introduced evidence for that purpose, nor the inadequacy of its method of segregation, could detract from the force of the proof it had already submitted in direct rebuttal of the Commission's findings. The effort at segregation came after voluminous testimony had been taken which fully presented appellant's case with respect to the value of its property and the result of its operations as an integrated system and the bearing of this evidence upon the contested rate. This proof could not be ignored because of a futile attempt, in response to the State's pressure, to find an alternative ground to support the attack upon the Commission's order. The first and primary ground remained and the determination of the court of first instance as the trier of the facts that the Commission's rate was confiscatory could not properly be set aside by the application of an untenable standard of proof and in disregard of the evidence which had been appropriately addressed to the Commission's findings and had been properly submitted to the jury."

MR. JUSTICE BLACK dissented without opinion.

The case was argued by Messrs. Charles L. Black and Marshall Newcomb for the appellant, and by Messrs. Alfred M. Scott and Edward H. Lange for the appellees.

Taxation—Federal Income Tax—Partnership Profits

Under Section 218(a) of the Revenue Act of 1918, a partner's distributive share of partnership profits must be included in determining his taxable income, whether the profits are distributed to the partners or not. The fact that the partnership was formed for the purpose of liquidating the assets of a corporation is of no legal significance in determining the partner's income tax liability under that section.

Heiner v. Mellon et al., 82 Adv. Op. 902; 58 Sup. Ct. Rep. 926.

These cases involve the taxable status of distributive profits of partnerships under the Revenue Act of 1918. A. W. Mellon, R. B. Mellon, and H. C. Frick, were equal owners of the entire capital stock of two distilling corporations prior to December 12, 1918. They formed two partnerships in which each had an equal interest and there were conveyed to one partnership the assets of one corporation and to the other partnership the assets of the other corporation. The assets included large whiskey inventories. The partnerships were formed to liquidate the corporate assets. Frick died December 2, 1919.

Partnership income tax returns for 1920 disclosed facts showing substantial gains from the sales of whiskey, but these were not reported as partnership income and neither of the Mellons reported the gains in their individual income tax returns, although they did report in their returns partnership profits arising from *other* business activities. The Commissioner of Internal Revenue determined that the gains from sales of whiskey were distributive profits and should have been included in the returns for 1920. He made a deficiency assessment against both Mellons. The Revenue Act of 1918 is applicable, and provides in § 218(a) that individuals carrying on business in partnerships shall be liable in their individual capacities for the income tax on profits earned therein, and that in computing the net income of each partner, his distributive share of the partnership net income shall be included whether distributed or not.

In two actions brought in a federal district court by the Mellon executors recoveries were allowed against the Collector of Internal Revenue for taxes previously

paid. The judgments were affirmed by the Circuit Court of Appeals. On certiorari, these were reversed by the Supreme Court in an opinion by MR. JUSTICE BRANDEIS.

The primary question in the cases was whether the net partnership profits in 1920, attributable to sales of whiskey, were in their nature taxable profits, since the partnerships were organized to liquidate the assets taken over from the corporations. Ruling that it was without legal significance that the profits were made in the course of liquidation, and emphasizing that the federal income tax system is based upon an annual accounting, MR. JUSTICE BRANDEIS says:

"The mere fact that the purpose of the partnerships was to liquidate the assets taken over from the corporations is not of legal significance. Profits made in the business of liquidation are taxable in the same way and to the same extent as if made in an expanding business. Nor is it of legal significance that the liquidation was not completed until 1925 and that until completion of the liquidation it could not be known whether the business venture, taken as a whole, had been profitable. The federal income tax system is based on an annual accounting. Under that law the question whether taxable profits have been made is determined annually by the result of the operations of the year.

"Purchasing real estate, subdividing and selling it in parcels is, in essence, a liquidating business. The claim has been repeatedly made that no income was realized until the investment was recouped; but the Board of Tax Appeals has uniformly held in accord with Article 43 of Regulation 45 (and later regulations) that the cost of real estate must be apportioned among all the lots, and income returned upon the sales in each year, regardless of the number of lots remaining undisposed of at the close of the tax year. A like rule has been applied where the taxpayer had purchased personal property in a block and was engaged in selling it in parcels. The claim that there was no taxable income until the capital had been returned was rejected.

"The fact that it might prove that when the business was fully liquidated the profits of 1920 were offset by heavy loss of later years is immaterial. Losses suffered by a taxpayer in a later year may be deducted from profits, if any, earned by him in that later year; but the tax on a year's income may not be withheld because losses may thereafter occur."

Certain other contentions of the taxpayers, based upon the dissolution of the partnerships by reason of Frick's death before 1920 and asserted legal consequences flowing therefrom, were discussed, but were rejected.

Mr. Justice Reed took no part in the decision of the cases.

The cases were argued by Mr. Assistant Solicitor General Bell for the petitioner, and by Mr. John G. Frazer for the respondents.

Federal Courts—Jurisdiction Over Suits Against United States to Recover Taxes

Under §24(20) of the Judicial Code, collection of a tax by the collector of internal revenue is indispensable to jurisdiction of the district courts over a suit against the United States in lieu of a suit against the collector. Under that section the district courts have no jurisdiction to recover a sum paid in discharge of 1918 income taxes, and later, in 1924, found by the commissioner to have been an overpayment for that year and credited by the commissioner against a deficiency on the taxpayer's 1917 income tax, since the collector did not collect such sum in 1924, when the credit was allowed.

Lowe Brothers Co. v. United States, 82 Adv. Op. 924; 58 Sup. Ct. Rep. 896.

This case presented a question as to the jurisdiction of the federal district courts under § 24(20) of the Judicial Code over suits against the United States for the recovery of taxes. The petitioner had overpaid income and excess profits taxes for 1918, and the Commissioner in May, 1924, signed a schedule of overpayments approving a credit of part of the 1918 overpayment in a sum of more than $10,000 against a tax deficiency for 1917. The collection of the 1917 deficiency was at that time barred by the statute of limitations. The collector in office in 1924, when the credit was allowed, having retired, the petitioner brought suit against the United States in a federal District Court in Ohio alleging overpayment of the 1917 tax by reason of the credit. It neither alleged nor proved any claim for refund of the 1918 overpayment, recovery of which, without claim for refund, was barred by limitation.

The District Court and Circuit Court of Appeals ruled against the taxpayer, but upon different grounds. On certiorari the Supreme Court, in an opinion by MR. JUSTICE STONE, affirmed the judgment, on the ground approved by the Circuit Court of Appeals,—namely, that the District Court was without jurisdiction to entertain the suit under § 24(20) of the Judicial Code.

In concluding that the collection by the collector is a *sine qua non* of jurisdiction over suits against the Government in lieu of the collector, MR. JUSTICE STONE emphasizes that here collection, if any, in 1924, was not made by the collector, since the application of the money in question took place by reason of the commissioner's action rather than because of any action by the collector. In stressing the controlling effect of these facts, MR. JUSTICE STONE states:

"As we think it plain that no suit could have been maintained against the collector to recover the alleged overpayment, it follows that the district court was without jurisdiction to entertain the present suit. If the 1917 tax can be said to have been collected at all, as to which we express no opinion, it was collected by the action of the commissioner in crediting against the 1917 deficiency the 1918 overpayment. In 1924, the year of the claimed overpayment, the collector received no overpayment of petitioner's tax for any year. If the 1917 taxes were then collected it was by virtue of the application to the 1917 deficiency of moneys already in the treasury. The collector was without authority to make such application. It was the commissioner's approval of the schedule of overpayments which was effective for that purpose. . . . The certification of the overpayment by the collector to the commissioner, a mere ministerial act, could subject the collector to no personal liability.

"It is true that under the statutes of the United States the collector is relieved from personal liability except in the case where the district court is of opinion that he acted without probable cause, . . and that such suits against the collector are commonly but a means of collecting the overpayment from the United States. . . But no statute has enlarged the collector's common law liability to suit, and we cannot ignore the words of the amendment of §24(20) which, in providing for a suit against the United States in lieu of one against the collector, make collection by him the *sine qua non* of jurisdiction."

The case was argued by Mr. John E. Hughes for the petitioner, and by Mr. A. F. Prescott for the respondent.

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A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

THE SCIENCE OF JUDICIAL PROOF, by John Henry Wigmore. Third Edition. Revised and Enlarged. 1937. Boston: Little, Brown & Co. Pp. 1065.—Dean Wigmore's monumental work on Evidence, which is known with gratitude to every working lawyer, was published in 1904. The present very substantial volume on the Science of Judicial Proof, published in its first edition in 1913, in its second in 1931 and in its third and present edition in 1937, does indeed in some part overlap with the work on Evidence, but its scope and purpose are different. The former deals in the main with what may be called Admissibility, the practical rules adopted by Courts in order to decide what facts are to be brought in evidence before the jury or considered by the judge. The present work has a different object; it deals with the scientific principles which should regulate the use of the admitted evidence in order to decided the issue in the case. Hence the name Science of Judicial Proof. To a person like myself who was a Common Law Judge for 7 years, and had for many years previously practised as counsel in contentious cases of fact, but who had never applied his mind consciously to the logical categories and processes which underlay his practical work, this work has come as an absorbing interest. It has made explicit what has been implicit in working practice. Just as M. Jourdain was astonished to find that he had been speaking prose all his life, so I am astonished to find that I have been applying these scientific principles. I realize my misfortune in that I was not a pupil of Dean Wigmore, so that I could have learned from him the principles and practised under his guidance their application in planned experiments and in the study of reported cases. In this latter aspect, the book in a mine of wealth, full of instructive illustrations of every type of judicial reasoning, accurate or fallacious. The mere logical analysis may seem a little tough sometimes, but the illustrative specimens are intensely interesting.

I have asked myself whether I should have done my work any better if I had studied this book in earlier days, not merely for information, but for living mastery of the principles so as to apply and use them. I think the answer should be in the affirmative. Rule of thumb is all very well, especially in a subject like legal proof, where the subject matter is mainly the stuff of common life, and the logic is generally inexact and directed to probabilities rather than certainties. Besides, as Dean Wigmore points out, the actual course of proof in a court of law is in a very human atmosphere, often charged with emotion and excitement. But all the same, the logic is there. A workman is all the better if he knows and understands his tools as scientifically as he can. On the other hand, I observe with interest how often Dean Wigmore is able to illustrate some rule by quotations from the directions of English or American judges, who may not have known of the rules but certainly could apply them correctly.

It is impossible in a brief notice to do more than refer to the most salient topics contained in this book of more than 1000 pages. The two first chapters are perhaps the most fundamental. They repeat to a certain extent what in substance is found in the earlier general work on Evidence. They define certain elementary distinctions which underlie every judicial enquiry. At the outset there is the *factum probandum* as contrasted with the *factum probans*. The former is the central question which is found in every case. As Dean Wigmore points out in an appendix, the ultimate question is fixed at the start of the trial, whereas in detection, as we know from reading detective novels, the question has to be defined as we proceed. Contrasted with the *factum probandum* is the *factum probans*, the material elements which go to establish the probandum. But though there is in the last resort the single *factum probandum*, there is also the *interim probandum*, which has to be separately proved, so as to combine with its fellows, in pointing to the final conclusion, and there may be several *interim probanda*. The main logical method in use here is inference, by which from particular facts a conclusion, interim or final, is reached. From certain facts we infer others, the inference is the process, the proof the result. In ordinary cases, the inference is probable, not certain. We have to select that inference out of the possible alternative inferences which is most probable according to common sense and experience. We cannot expect in legal inquiries that thoroughgoing investigation of a wide range of contrasted or identical instances which science would employ in order to infer a law of nature. As compared with inference the deductive form of reasoning is less important for the lawyers. Dean Wigmore classifies evidentiary facts as falling under (1) what he calls autoptic proference, an alarming term which means things "*oculis subjecta fidelibus*", such as knives, documents, garments, *et hoc genus omne*, (2) testimonial evidence, that is, narrative evidence, (3) circumstantial evidence, where the proof is achieved by way of inference from particular circumstances, not by the narrative of an observer of an occurrence. But it is clear that classes (1) and (3) must both be supplemented by (2). The thing produced has no significance until it is connected by testimonial evidence with the event, and the same is true of the circumstantial facts. Then Dean Wigmore propounds the four "probative processes" which, he says, lie at the basis of all legal reasoning. He distinguishes the "proponent", whom he represents as P, and the opponent, whom he represents as O. Dean Wigmore is fond of

symbols, and in the later and more complex part of his book gives specimens of elaborate diagrams to illustrate the conflict or harmony, the dependence, the interaction of the different stages of proof. I have never been able to use diagrams or symbols with any ease or confidence and, though I admire this part of Dean Wigmore's work, I find I can handle the problems better without the aid or perhaps embarrassment of his very ingenious charts. But by these symbols he does simply show his elementary processes. Let P denote the proponent. The opponent, O, may either deny what P alleges, that is figured as OD, or he may explain it away, for instance by giving an innocent explanation of his possession of an incriminating object, this is figured as OE, or he may set up a rival view, a process denoted by OR. I suppose an alibi is a good instance of this last. The prosecution alleges that the accused did an act, he rebuts the charge by showing that at the relevant time he was somewhere else. This analysis of the four processes sounds elementary and obvious, but all the same, as Dean Wigmore points out, it is exhaustive of the processes of proof and brings to consciousness the underlying principles. Of course, some other rule may be helpful in practice, such as the methods of similarity and difference, or the explanation or refutation of an inference by inconsistent instances or by dissimilarity of conditions.

The great bulk of the work falls into two main parts, the part dealing with circumstantial evidence and the part dealing with testimonial evidence, followed by a comparison of the relative values of the two. The author refuses to say that one of these is more valuable or truer in results than the other. He is able to show by a great mass of instances that either may be fallacious. There are both in England and in the United States only too many cases in which either class of evidence has led to erroneous decisions. History shows a sad number of cases where people have been hanged for murders which were never committed, as was conclusively shown by the person supposed to have been murdered turning up alive. These were largely cases of circumstantial evidence, apparently most convincing. Dean Wigmore is justified in saying that the proverb that facts cannot lie is not true as generally understood. As he points out, what we are dealing with is testimonial evidence of certain facts and then the inference from these facts that the crime was committed as charged or the acts done. Either class of evidence, testimonial or circumstantial, may be mistaken. Indeed, as he says, a Court is not concerned with facts in the real or objective sense, but facts as reflected in the evidence and intelligences of men. He also gives a series of startling instances of mistaken identity, apparently based on the most conclusive evidence yet in the end found to be fallacious. We had in this country, not so many years ago, the famous Beck case. In history there was the Lyons Mail case. The curious should turn to Dean Wigmore's book, a great bulk of which is devoted to illustrative instances drawn from the widest possible range, and brought under every head of rule or analysis. I wish I had the opportunity of giving a selection. The reader may find pleasure and instruction in reading and comparing in detail the instances cited and considering how they justify and explain the text. After reading the book, I find myself picking out and re-reading and comparing typical classes of illustration. A striking case is that of a man charged with bigamy, who was confidently identified by the woman with whom the bigamist went through the ceremony and lived for some time as if her husband. But there seems to be no doubt that she was mistaken.

The defects of testimonial evidence are very fully discussed and exemplified. What is involved is the result of perception, recollection and narration. Under each of these heads there may be defect or failure. Dean Wigmore has made practical experiments in order to investigate possibilities of error. He has staged a happening and then taken and compared the accounts given by the different spectators, whom he has classified. He has given percentages of error. I think I am right in saying that even in the most intelligent members of the audience there was no perfect account. Certainly every judge who has tried cases of fact, has been compelled to realize the defects of oral testimony, even when tested by cross-examination and checked by putting one witness against another. He welcomes, whenever he can get it, a written statement made at the time with no idea of recording evidence, before processes of forgetting, of prejudice, self-sophistication, sophistication by discussion with others, and other disturbing factors have done their work. So much for those constituents of oral evidence which fall under the heads of perception and recollection. Then the third stage, narration: that is, the oral evidence of men in the course of a trial, in the witness-box under conditions which most people find trying, introduces further tendencies to error. With all these defects it is not astonishing that legal history contains many instances of wrong decisions based on oral testimony. Apart from my forensic and judicial experience I have noticed in myself instances of defective observation. To give one instance, I remember one summer evening when motoring in France, a cyclist proceeding ahead of us on his wrong side swerved right across the road without warning, crossing in front of us to his proper side. By luck and my chauffeur's skill there was only light contact and no harm worth mentioning. I observed that I wondered why the man had swerved across as he did. My mother said it was to avoid the girl cyclist who was coming on her proper side in the opposite direction to the man and who came and spoke to her after the collision. Neither my chauffeur nor myself had seen her at all, though we were sitting in the front of the car and though it was broad daylight.

No doubt much can be done by what Dean Wigmore describes as forensic methods of detecting testimonial error,—by demeanor, cross-examination, by comparing the evidence of a witness with that of others either on the same or opposite sides, or even by the self-contradictions of a witness. Anyone who has not done so should read the illustrations which Dean Wigmore gives under this head, many examples of ingenious, simple, and effective cross-examination. He has also a chapter on scientific methods which have been suggested as likely to enable a Court to decide whether a man is speaking the truth. These he describes as "methods of experimental psychometry." For instance there are the machines for registering changes of blood-pressure or respiration. I am afraid that I am old-fashioned and sceptical on these matters, and was glad to find that Dean Wigmore thus sums up the position: "The conditions required for truly scientific observation and experiment are seldom practicable. The testimonial mental processes are so complex and variable that millions of instances must be studied before safe generalizations can be made. And the scientist in this field is deprived (except rarely) of that known basis of truth by which the aberrations of witnesses must be tested before the testimonial phenomena can be inter-

preted." He sanely concludes: "No wonder then that the progress of testimonial psychometry must be slow." This is a different matter, of course, from the help which science affords in the discovery of truth, for instance, especially in criminal cases. Thus some help can be obtained in paternity cases from comparing types of blood; medical jurisprudence is constantly called in; and in murder cases scientific evidence constantly helps in establishing clues. I remember a set of cases in which I was counsel where the question was whether certain steamers had been accidentally sunk or had been deliberately scuttled to enable the shipowners to recover the excessive insurances. An important part of the evidence in these cases consisted in elaborate plans of the complex pipe arrangements of the vessels, and of the means by which they could be flooded and sunk by sea-water by manipulating particular valves, and calculations as to the rate of inflow and the effect on sinking the vessel. Indeed in these days of mechanism and of scientific applications evidence of an expert character is constantly necessary to decide a case. Sometimes such evidence is the essentially material or decisive evidence in the case, sometimes it is only one element in the complex mass of evidence, dealing with *interim probanda*, the central *probandum*, to refer to the illustration just given, being whether there was the intentional casting away of the vessel; other *interim probanda* would be questions of motive, subsequent conduct, and other matters of circumstantial evidence, and also matters of single narration, with the various inferences following on the actual evidence, whether oral, documentary, photographic or other. Dean Wigmore gives some models of the methods of analyzing mixed masses of evidence, sometimes according to the narrative method and sometimes according to what he describes as the chart method. He gives a very full list of criminal trials as recorded in various publications, so that the student may practise upon them his skill in analysis. I find in these lists two criminal cases of the many that I tried as a judge, the Wallace case and the Kylsant case. I regard them both as significant cases of complex evidence. The former was mainly interesting as presenting a series of *interim probanda*, the total effect of which was said by the prosecution to be to establish the final *probandum* of guilt: but at each stage of the prosecution's case there was the opponent's alternative explanation, so that, as I thought and the Court of Criminal Appeal thought, the final inference of guilt could not safely be drawn from the complex mass, and the prisoner was finally acquitted by the Court of Criminal Appeal, which quashed the jury's verdict of guilty. In the Kylsant case the raw material of the evidence consisted of a mass of accounts, but the final *factum probandum* was the fraudulent intention of the accused man in issuing a prospectus which, true in what it stated, was misleading because of what it omitted, a lie that was half a truth. In the last resort, the issue depended on the decision of the jury on a broad commonsense matter of human intention: that is, on a question of personality. This emphasises the thesis developed in one place by Dean Wigmore, that the ultimate determination is not to be explained in the last resort by mere logic, but is an act of the will. He gives a striking metaphor. He figures the parallel of a man in a bath chair, getting pushes as a result of the *interim probanda* sometimes in one direction and sometimes in another, till the ultimate push takes him at last into the doorway, or as the event may be, away finally from it. This is so not merely in criminal trials, but in many civil actions, where the evidence is complex and conflicting.

I ought also to refer to the elaborate and fully documented analyses which form a large part of the chapters on circumstantial and testimonial proof. This I can only touch on very briefly. As to the former, Dean Wigmore distinguishes the three categories of evidentiary data, concomitant, prospectant, and retrospectant. The "concomitant" data are the accompanying conditions, supposed to attend at the time and place of the *probandum*. Thus, for instance, if the *probandum* is the doing of an act, such would be tools, personal and material conditions. Prospectant data are matters such as threats, motives, design and so forth, which are taken as antecedent to the act. "Retrospectant" data are matters subsequent to the act (such as conduct evidencing a consciousness of guilt), which raise a probable inference of guilt. These categories may to a large extent run into each other, but the general distinctions help to clearness of thought. There must always be the single inference from the evidence to the existence of the fact, and then there may be the second or double inference from the existence of the fact to its significance. For instance, if consciousness of guilt is in question, there is the inference from the evidence that certain things were done, e.g. the flight or attempt to conceal what might be regarded as incriminating traces. Then the second inference is as to whether such conduct does really evidence guilt or whether an alternative explanation is possible. Dean Wigmore has further heads of analysis according as the *probandum* is the doing of a human act, a human trait or condition, or an event or cause, &c., of external nature. There is a very instructive chapter on identity as a *probandum*.

The analysis of testimonial evidence covers no less than 500 pages. This is not so alarming as might appear, because a large space is occupied in illustrations from recorded cases. His analysis deals with the three main elements to which I have already referred: perception, recollection, narration. On this, as indeed on the whole of the work, I can here only refer the reader to the actual text.

I am conscious of the inadequacy of this summary notice. While apologising, I must excuse myself by referring to the wide scope of the subject and the closeness and intricacy of the detailed analysis. I can only wish that I had known of it and been able to study it at an earlier stage of my legal career, rather than now when my appellate work seldom gives real occasion for analysing and deciding on evidence of fact. It would, I am confident, have often helped me to clear my mind and understand what I was doing.

Dean Wigmore's reputation is so well established that I need say nothing about it. I can only here say that I regard this work as a most valuable and original addition to legal thought.

WRIGHT.

London, England.

State House v. Pent House: Legal Problems of the Rhode Island Race-Track Row, by Zechariah Chafee, Jr. 1937. Providence: The Booke Shop. Pp. xxii, 165. Price $1.00.

It is unnecessary to announce that this timely little book is a masterpiece of its kind, keen, brief, exact, and provocative. Nothing less was to be expected of Mr. Chafee by those familiar with his previous work, especially "The Inquiring Mind" and the famous narrative and excursionary notes to Pound and

Chafee's "Cases on Equitable Relief Against Torts" and to the two volume Chafee and Simpson "Cases on Equity."

Mr. Chafee is a persistent observer of the law in action. His specimen this time is the current ugly dispute, or political armageddon, between His Excellency Robert E. Quinn, Governor of Rhode Island, an old-timer in the politics of that state, and the parvenu Mr. Walter E. O'Hara, textile manufacturer, newspaper-owner, and promoter of the now notorious race-track, Narragansett Park. In 1934 Rhode Island legalized *pari-mutuel* horse racing. Within three months the energetic Mr. O'Hara had promoted and built Narragansett Park and commenced racing, drawing tremendous crowds and taking as much as $25,000.00 a day net profit in season, even after paying half as much to the state in taxes. Perhaps to protect this golden franchise Mr. O'Hara and his newspaper entered politics in opposition to Governor Quinn and the influential Providence *Journal*. The fight became bitter and personal. In the fall of 1937 Governor Quinn determined to close the park and annihilate Mr. O'Hara. The Rhode Island Division of Horse Racing, the administrative body created to keep racing clean, attempted to remove Mr. O'Hara from control of the Narragansett Racing Association and to suspend the Association's license. For his resentful remarks over the radio vilifying the Governor for this action Mr. O'Hara was arrested on charges of criminal libel. The Rhode Island Supreme Court quashed the orders of the Division of Horse Racing, as arbitrary and prejudiced. Governor Quinn immediately proclaimed martial law and closed Narragansett Park with the machine guns of the National Guard. At the writing of the book Mr. O'Hara was still under indictment for criminal libel. There are also pending against him two civil suits for libel for damages in the total amount of $600,000.00. In addition the Narragansett Racing Association and various individuals and officials are under indictment for violation of the Federal campaign contribution laws.

Mr. Chafee's analysis of and comment upon the law of this situation is alert and incisive. He quickly explains the law of criminal libel, its historical abuses, and its probable abuse in this situation. He explains clearly for the layman as well as the lawyer the tyranny of the action of the Division of Horse Racing, the doctrine of the separation of powers, the danger of trials by administrative officials in general, the courage of the Rhode Island Supreme Court in quashing the Division's orders, and what can be done to prevent such abuses in the future. He explains the probable invalidity of the Governor's proclamation of Martial Law, and speculates upon the possible remedies by Federal injunction, or State or Federal suit for damages, of one who finds himself or his business in Mr. O'Hara's position. He questions the wisdom and, because of Rhode Island's constitutional prohibition against lotteries and because of the abdication of its duties by the Rhode Island General Assembly in submitting the question to referendum, challenges the validity of the act originally permitting the *pari-mutuel*.

It was not merely a taste for the antique that led Mr. Chafee to quote at the head of one of his "Problems" Sir Edward Coke's saying that "Magna Charta is such a fellow that he will have no sovereign." To Mr. O'Hara, and to all who may ever be confronted by a like abuse of power, Mr. Chafee's book is a modern re-writing of that obdurate document, and an imperative if brief summons to its defense.

The book is fortified by appendices quoting the laws and cases involved, the Proclamation of Martial Law, the newspaper fulminations of both sides, and the comments of neutrals, with full explanatory notes by the author. It is Mr. Chafee's peculiar gift that these appendices and notes are not merely learned impedimenta, but are integral and exciting parts of the book as a whole.

WILLIAM D. STAPLES.

Roanoke, Virginia.

The Interstate Commerce Commission: A Study in Administrative Law and Procedure. Part IV and Conclusion, by I. L. Sharfman. 1937. New York: The Commonwealth Fund. Pp. 550. It is a happy coincidence that the year that marked the fiftieth anniversary of the establishment of the Interstate Commerce Commission should have seen the completion by Prof. Sharfman of his study of the Commission. The five volumes that now make up this study will amply repay a reading by those interested in the origin and growth of administrative law and procedure in this country and in the extension of the rule of law to economic controversies. They are indispensable to those who practice before the Commission.

Professor Sharfman's study is noteworthy in this respect: it shows that the tide has turned from the consideration that students of the law have given to the judicial control of administrative tribunals, to a consideration of the intra-administrative law that these tribunals are building up without control or review by the courts. In the vast majority of cases tried before the Interstate Commerce Commission, the Commission's decision is final, but few cases ever reaching the courts. These five volumes, to borrow a phrase from Professor Frankfurter, show the emergence of modern administrative law as an indispensable evolution of the Rule of Law.

In the four earlier volumes Prof. Sharfman considers the legislative basis of the Commission's authority (Part I), the history of the Act that it administers and the scope of its jurisdiction (Part II), and the character of its activities (Part III, two volumes).

The volume just published (Part IV) deals with the Commission's organization and procedure. It is divided into three general sections. The first section, "The Mechanism of Administration," deals with the Commission and its personnel, the manner in which the Commission acts through divisions of its membership, the delegation of authority to individual commissioners and to the various bureaus, and the manner in which the administrative functions are co-ordinated and brought into harmony of policy and consistency of practice.

Professor Sharfman brings out how the Commission, entrusted by Congress from the beginning with the responsibility of formulating its own rules of procedure, has achieved a flexibility in the field of subjective law that has enabled the Commission to meet the ever-increasing problems presented to it for determination. The Commission's approach to questions of procedure bears today the impress of the mind of its first chairman, Judge Thomas M. Cooley, who had the vision to understand that proceedings before an administrative tribunal such as the Commission required simplicity and not complexity in procedure.

Professor Sharfman in concluding his discussion of the procedural processes of the Commission con-

siders at some length the question of the Commission's independence. He analyzes the proposal made by the President's Committee on Administrative Management to place the independent regulatory commissions, including the Commission, under a cabinet officer, and shows the fallacies upon which this proposal rests. As the complexity of our economic and social life increases, we may expect these administrative tribunals to occupy a greater and not a smaller field, and to make a greater contribution to the rule of law than might have been expected a few years ago. If they are to make such a contribution, and if they are a part of a democratic way of life as many now believe, they must function as independent tribunals in every sense of the word.

The last section of this volume is devoted to a consideration of the administrative burden. There is a detailed analysis of the number and kind of cases that the Commission has had before it in recent years, the extent to which the membership of the Commission has been increased to meet the ever-increasing volume and complexity of the work, and the manner in which the Commission apportions its work to its divisions, bureaus, and individual commissioners.

In his conclusions Prof. Sharfman suggests that the Commission is securely fixed in an enviable place in the Federal governmental establishment, and that this is grounded for the most part in the following considerations: FIRST, the essence of private enterprise has been maintained in spite of the extensiveness of public control; SECOND, the act embracing this control has been evolved by a long process of trial and error, and reflects actual needs convincingly established by the test of experience; THIRD, the Commission's accomplishment has been realized through an administrative policy dominated by a sense of realism and restraint; and FOURTH, (and this is of great interest to lawyers), the administrative processes employed by the Commission, though constituting a departure from traditional legal arrangements, have safeguarded all essential rights and interests.

Lawyers whose work brings them in close contact with the Commission and its problems will agree with Prof. Sharfman's conclusions in their broad outline. Difference of opinion will, of course, arise when individual cases are considered. He suggests that the restraints that characterize the Commission's action have been carried too far in some respects, and that the Commission might well have required general reductions in freight rates in the last few years (as the Commission did in the Eastern Passenger Fare Case). The railroads, on the other hand, believe not only that the Commission was right in refusing to require such general reductions, but that the Commission in approving increases in rates in recent years considerably less than those sought by the railroads, has placed too great a restraint upon the railroads in their efforts to obtain greatly needed increases in revenue through increased rates.

These diverse views but illustrate the complexity of the problems before the Commission in recent years. The Commission has been charged with the duty of comprehensively regulating one agency of transportation, the railroads, who have been competing with other agencies of transportation largely or wholly unregulated. The situation has been an impossible one from the standpoint of both the Commission and the regulated agency, and will continue to be so until there is an equality in regulation and in all other respects among all the agencies of transportation. A long step toward such an equality was taken when Congress passed the Motor Carrier Act of 1935.

The rapidity of the changes in our laws is no better exemplified than by a review of the five volumes of Prof. Sharfman's study. The first volume was published in May, 1931. Since that time the jurisdiction of the Commission has been greatly enlarged, and the problems confronting it have increased in number, complexity and importance. Congress not only has entrusted the Commission with the regulation of motor carriers, a task of the greatest magnitude, but has given the Commission very important and difficult duties in connection with the reorganization of railroad companies. Thus almost before the completion of the study as originally planned, new volumes are required to bring the work up to date. It may not be too much to hope that Prof. Sharfman will at some time in the future undertake an appraisal of the work of the Commission in these new fields.

ELMER A. SMITH.

Chicago.

Youth in the Toils, by Leonard V. Harrison and Pryor McNeill Grant. 1938. New York: The Macmillan Company. Pp. 167.—In this provocative book a research criminologist, Leonard V. Harrison, and a boys' worker, Pryor McNeill Grant, offer the results of a survey of New York City under the sponsorship of the Delinquency Committee of the Boys' Bureau. They find much to criticize in the procedures of criminal law as they affect minors between the ages of sixteen and twenty-one. Most objectionable is the hardening process to which all are subjected although only one in four eventually goes to prison. The authors regret the tardy assignment of counsel after a boy has spent weeks in awaiting arraignment and the lack of compensation for assigned lawyers except in capital offenses. They note that a hundred and ten cases were abandoned in 1935 by assigned counsel to be taken up by the Voluntary Defenders Committee of the Legal Aid Society. Mr. Harrison and Mr. Grant believe this organization should handle more than the 25% of assigned cases for which it is now responsible.

They praise the extra-legal experiments of the Brooklyn Adolescents Court. This is a magistrate's court which, with the consent of parents and a representative of the district attorney, substitutes the protective Wayward Minor Act for the penal code. Serious charges are passed on to the criminal courts. The authors believe that this work should receive legal validation. They recommend a new delinquency code for minors and a Delinquent Minor Court within the Court of Domestic Relations. For this they would advise two functional units. The first, composed of examining justices, would be limited in its duty to the determination of guilt or innocence. The second would be a disposition board; its presiding justice, preferably a lawyer, would be assisted by psychiatrists, psychologists, and educators. The first few days of confinement, most effective for rehabilitative measures, would not be wasted as at present. Treatment procedures would include the extension of ordinary probation, hostels on the English plan for those who may continue with school or job, but need removal from home or neighborhood, and training camps for those requiring stricter discipline. Only the incorrigible would be relegated to prison.

The authors admit that the case histories they present are not a cross-section but represent situations which are not adequately dealt with by the present sys-

tem. For this reason they may be accused of sentimentality. They have written a challenging book, however, whose conclusions deserve the serious attention of all who are interested in the problem of stopping crime at its source.

JAMES HARGAN.

New York City.

Leading Articles in Current Legal Periodicals

BY KENNETH C. SEARS
Professor of Law, University of Chicago

ADMINISTRATIVE LAW

Judicial Review of Administrative Decisions, O. R. McGuire, 26 Georgetown L. Jour. 574. (Mr. '38; Washington, D. C.)

Col. McGuire is a student and practitioner of administrative law. His practice comes from representing the national government as counsel to the Comptroller General. Interesting facts appear as to the *vast* quantity of the controversies that are decided by our national administrators. In view of them, President Vanderbilt's remark last October that: "Some authorities even say more decisions are being made by administrative tribunals than by the ordinary courts," is amusing in its conservatism. For these administrative disputes, the author is convinced that the common law technique is not adapted. However, the technique that is commonly used by our national administrators is in need of improvement. A sharp issue is taken with President Vanderbilt's idea that there should be a complete review of the findings of fact of administrative authorities. The improvement that is favored is contained in the report of the American Bar Association's Special Committee on Administrative Law that was approved in principle by the House of Delegates last year. Parts of this report and attacks upon it are considered and the final conclusion is that the plan "offers the only inexpensive and practical plan which appears available to bring the administration of administrative justice near to the homes of the individuals who may be involved."

CONSTITUTIONAL LAW

The War Power as the Basis for a National Agricultural Program, Maurice H. Merrill, 17 Nebraska L. Bull. 3 (Mr. '38; Lincoln, Neb.)

Professor Merrill has written views which should be interesting to all who are interested in the United States, particularly those who are deeply interested in public affairs. There is a problem. How may we avoid the consequences of the majority opinion in United States v. Butler, even though many think that it should not be taken as a final word. The Merrill idea is that a national agricultural program can be justified under the specifically granted war powers and the necessary and proper clause. Through our unregulated farming we are mining the soil and wasting it and thus we are debasing agrarian life. A national program, for the sake of national defense, would seek to prevent the overproduction of basic crops. This would stabilize farm income and be an incentive to prevent the waste of agricultural resources. The program would provide for soil improvement and control soil erosion; it would also establish adequate reserves of basic products for unfavorable years. Agriculture is so extremely important for success in war that it is believed that an agricultural program aiming directly at this object would be upheld as within the constitution. There are opinions of the national supreme court which furnish analogies that should be sufficient to convince the skeptical and not all of them dealt with legislation that was passed while this country was in a war. At least government attorneys should not overlook a good argument the next time they attempt to sustain a national agricultural program enacted by the only legislative body that can pass such a measure, viz the Congress of the United States.

CONSTITUTIONAL LAW

Freedom of the Press and of the Mails, Eberhard P. Deutsch, 36 Michigan L. Rev. 703. (Mr. '38; Ann Arbor, Mich.)

The question is whether the author has a desirable point of view as to the freedom of the press or whether he argues for too much freedom from restrictions upon mailable communications. He criticizes most of the opinions of our national courts except those which have placed restraints upon governmental regulations. The often repeated regret is that the Supreme Court did not at the outset resist "slight deviations" from the First Amendment, interpreted, however, in the rigorous fashion he advocates in a very interesting polemic of forty-nine pages. Despite its length the style is attractive and the reading is very entertaining. The author is hopeful of a reaction and thinks that there are favorable signs of this in certain recent opinions. It is reasonably clear that Mr. Deutsch opposes: (1) the prohibition of newspapers containing lottery advertisements from using the mails because the statute provided "a national paternalistic protection of public morals" contrary to what the people of Louisiana had approved; (2) the often stated idea that publishers obtain a privilege to send their newspapers through the post office at less than cost and therefore conditions may be placed upon the exercise of the privilege; (3) the application of the orthodox rule of administrative finality to the fraud orders of the Postmaster General; (4) the use of administrative exclusion orders except for the prevention of (a) "clear and present danger," (b) the "formal use of words containing no expression of an idea," and (c) the publication of obscene matters that transgress "the primary requirements of decency." Particularly it is desired to have an unquestioned recognition of the idea "that abridgment of the use of the mails or of the second-class mailing privilege is abridgment of a free press."

CONSTITUTIONAL LAW

Admissibility and Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction, Jacobus ten Broek, 26 California L. Rev. 287. (Mr. '38; Berkeley, Calif.)

A challenge is issued to the accuracy of the expression that if the language of the constitution is clear and unambiguous, resort to collateral aid in the interpretation thereof is unnecessary and may not be indulged in. (1) Frequently this statement is a mere dictum. (2) Sometimes the existence of a dissenting opinion proves that the language is not clear and unambiguous. (3) However, the Court will utilize "collateral materials assertedly to affirm a conclusion already reached on a basis of the constitution itself." (4) Again, the Court will deny admissibility and then seek to demonstrate that the collateral materials are consistent with the point of view of the Court. (5)

Resort is made to these materials "when the constitutional words require definition." (6) Finally in some cases the rule has been ignored and by use of collateral materials the Court has reached a conclusion opposite to constitutional language that was "exceedingly clear, explicit, and unambiguous." The author has written a clear and concise article that deals with a fairly abstruse subject. It is enjoyable reading.

JURISPRUDENCE

Fifty Years of Jurisprudence, Roscoe Pound, 51 Harvard L. Rev. 777. (Mr. '38; Cambridge, Mass.)

The third and final installment that surveys the development of jurisprudence during the past fifty years will be interesting to the minority of practicing lawyers and judges who are interested in legal philosophy. Perhaps the greatest interest will be concerned with American skeptical realism. Here Karl Llewellyn and Jerome Frank seem to receive the major attention, perhaps because they seem to be the extremists of this particular school of thought.

LEGAL BIOGRAPHY

An Evaluation of Chief Justice White, Lewis C. Cassidy, 10 Mississippi L. Jour. 136. (F. '38; Meridian, Miss.)

The life and work of Chief Justice White are reviewed in a manner that holds the interest. It is no mere unrealistic eulogy that lawyers are fond of delivering upon the occasion of a memorial in honor of a departed fellow practitioner or judge. The critical faculty of the author caused him to write that White's opinions will be searched in vain "for the terse" and that the Chief Justice "never learned to write well." Tribute is paid to the clearness of his vision and to the thought that the prestige of the Supreme Court was never greater than when he left it in 1921. From the brief sketch one wonders whether more can be stated with accuracy than that White was not a great man but a capable lawyer with an impressive personality. Also it would seem that aside from his services in the Confederate army his life was favored by good fortune. Particularly does this seem to have been true in his appointment to the Supreme Court wherein he was the beneficiary of the indefensible system of Senatorial courtesy.

LEGAL HISTORY

The Technic of the American Revolution, O. G. Libby, 72 United States L. Rev. 91. (F. '38; New York City.)

If one needs to have his memory revived, or needs to become acquainted with a historical view of the Revolution rather than the view that American politicians try to popularize on the Fourth of July, he can read what Professor Libby has written with profit and pleasure. Remarkable it is that it was not until 1895 that Professor Tyler of Cornell "made public for the first time the truth concerning the Loyalists or Tories of the American Revolution." The point of view of the English historian, Lecky, is approved: "The American Revolution was the work of an energetic minority, who succeeded in committing an undecided and fluctuating majority to courses for which they had little love, and leading them step by step to a position from which it was impossible to recede." However, Professor Libby's succinct paper is sympathetic with the revolutionists even though he makes no attempt to conceal the fact that the underlying cause of the dispute was the colonial commerce that was built very largely upon rum and slaves and was carried on in defiance of the navigation laws. He also states that there is not the "slightest" doubt that the minute men were assembled in Lexington at an early morning hour in order to provoke the British soldiers to fire on them. This was just one step in the revolutionary technic.

PUBLIC SERVICE COMPANIES

The Regulation of Interstate Telephone Rates, Carl I. Wheat, 51 Harvard L. Rev. 846. (Mr. '38; Cambridge, Mass.)

The author is the Telephone Rate Counsel of the Federal Communications Commission but his article gives the impression of being a scholarly effort in a difficult field and not a mere brief against the American Telephone and Telegraph Company. It is the latter company that is practically the one concern that is the object of national telephone regulation. For in it is concentrated over ninety-five per cent of the nation's interstate telephone business. That part of the article that deals with this unique company that constitutes "the largest single aggregation of wealth ever concentrated in private hands" is interesting reading. The part that deals with the abstruse problems of rate regulation will probably be enjoyed only by the specialists in that subject matter. Indeed, it is so difficult that the author is frank to state that the informal procedure of the council table rather than the formal method of adversary procedure is the preferable way of solving the problem of public regulation.

TORTS

Last Clear Chance: A Transitional Doctrine, Fleming James, Jr., 47 Yale L. Jour. 704. (Mr. '38; New Haven, Conn.)

After a consideration of the various aspects of the intricate doctrine of last clear chance, the author states his hypothesis: ". . . today people generally feel that only those to blame for an accident ought to be made to pay for it; that if defendant and victim are both at fault, the victim should get something, but not as much as if he had been blameless; that faults should be compared and recovery, somehow, roughly apportioned to them; that in this comparison one whose negligent operation of a dangerous vehicle has endangered others should fare worse than one whose carelessness has exposed only himself to peril." It is admitted that the first part of this hypothesis is not adhered to where social insurance is the scheme, as in industrial accidents. This sort of insurance may be expected to cover "the whole field of accident litigation within a generation or so." Thus, apparently, the author's hypothesis will have only a limited validity. But while we are on our way toward liability without fault, the immediate development is likely to be "the enlargement of the jury's sphere in negligence cases."

Supreme Court Control Urged

A special committee of the Cleveland Bar Association has been appointed to cooperate with the Ohio State Bar Association in endeavoring to persuade the Supreme Court of Ohio to take jurisdiction of all disciplinary action against members of the Bar.

The Committee appointed is made up of: Ben C. Boer, Chairman, Jay P. Taggart, Glen O. Smith, J. Virgil Cory, and George M. Roudebush. The Committee was given authority to file a brief in the Supreme Court of Ohio. The Ohio State Bar Association is expected within the next ninety days to file a brief in the Supreme Court in support of the proposal.

Nominated for Officers and Members of Board of Governors

Sketches of Nominees for Officers of Association

FOLLOWING are brief biographical sketches of the nominees of the State Delegates for President, Chairman of the House of Delegates and members of the Board of Governors for four circuits. At the Washington meeting Secretary Harry S. Knight and Treasurer John H. Voorhees were renominated. Biographical sketches of these two officers were printed in the February, 1937, issue of the JOURNAL.

FRANK J. HOGAN

Frank J. Hogan, nominated for President by the State Delegates of the American Bar Association, was born in Brooklyn, New York, July 12, 1877, and came to the bar in the District of Columbia in 1902. His has been the career of the trial lawyer and during the past third of a century it has fallen to his lot to appear in some of the most celebrated American trials, several of which are bound to be historic.

Mr. Hogan was twice President of the Lawyers Club of Washington, and served as President of the District of Columbia Bar Association in 1932, the year that the American Bar Association last held its annual meeting in the capital city. He was a member of the Executive Committee of the American Bar Association from 1933 to 1936, and this year is Chairman of the Special Committee on Amendments and Legislation Relating to Child Labor.

He was honor graduate of the Georgetown University Law class of 1902 and in 1925 received the honorary degree of Doctor of Laws from his Alma Mater. He is now National President of Georgetown's Alumni. For ten years (1908-18) Mr. Hogan was a member of the Georgetown University Law Faculty, occupying the chairs of Wills, Partnership and Evidence. He inaugurated the case system in the last named subject at Georgetown.

A more personal and intimate view of Mr. Hogan is furnished by the following extracts from the speech of Mr. Charles Ruzicka, State Delegate for Maryland, who placed his name before the State Delegates at Washington. The speech appears in the Daily Record of Baltimore, issue of May 14:

". . . Mr. Hogan has never tried an important case as a result of direct retainer by the client. He is proud of the fact that every outstanding case, of the many in which all of us know he has appeared, came to him from brother lawyers. His career has been that of the Barrister, called in by his fellows to conduct their clients' cases in Court. . .

"His practice has been so general that one of our fellow members from this District, high in the councils of the American Bar Association, who knows Frank Hogan perhaps more intimately than any of the rest of them, has said of him:

"He is an 'honest-to-God' practicing trial lawyer . . . His distinction is wholly due to his activity as a member of the Bar and does not rest upon any political, banking, industrial or group connections. . . .

"No finer tribute can be paid by one lawyer to another than that which the late Newton D. Baker paid to Frank Hogan. Following several post-war years during which Mr. Hogan defended, without fee or thought of compensation of any kind, men who had been high in the country's service during the war and were then under attack, our war-time Secretary of War wrote him a letter in which he said:

" 'I did see, in one of our local papers, an account of the nolle in the Old Hickory case, and rejoiced to realize that the cruel persecutions are over. But the chief emotion I had then and have now was admiration and gratitude for your knightly conduct in the matter. I am sure you will permit me to say, quite simply, that I am proud to be in a profession which you have dignified by your defense of the innocent and otherwise defenseless. My admiration for your talents is high, but for your goodness of heart even higher—and hearts mean more to me than talents.' "

THOMAS B. GAY

Thomas B. Gay, nominee of the State Delegates for the Chairmanship of the House of Delegates, was born at Richmond, Virginia, in 1885. He was educated in the public schools of Richmond, Virginia, at Nolley's Preparatory School, and in the Law School of the University of Virginia, where he was made a member of the honorary fraternity of Phi Beta Kappa.

Mr. Gay was admitted to practice law in 1906, and has been an active member of the Richmond and the Virginia bar for more than thirty years. He has enjoyed a large general practice, particularly corporate, and has had extensive trial and appellate experience in the State and Federal Courts and in the Supreme Court of the United States, having also represented important financial interests before Committees of the Congress. He has been a member of the law firm of Hunton, Williams, Anderson, Gay & Moore of Richmond, Virginia, since 1916.

Mr. Gay was formerly President of the Bar Association of the City of Richmond, and is now a member of the Executive Committee of the Virginia State Bar Association, the Bar Association of the City of New York, the Association of Life Insurance Counsel, and the American Law Institute.

Mr. Gay was elected a member of the American Bar Association in 1916, served as a member of the Local Council (Virginia) in 1919, and again in 1933 and 1934, was Chairman of the Committee on Life Insurance Law in 1933, 1934 and 1935, and a member of the Special Committee on Administrative Law during the same period. He was a member of the old General Council and State Delegate (from Virginia) in the House of Delegates in 1936, 1937 and 1938, and was recently reelected as State Delegate for Virginia for a three-year term.

Mr. Gay was active in the work of preparing the New Constitution of the Association and spoke in favor of its adoption at the Boston Meeting in 1936. He was formerly a member of the Committee on Credentials and Admissions of the House of Delegates and is now member of the Committee on Rules and Calendar.

He is married and has one son.

GEORGE L. BUIST

George L. Buist, nominated for Member of the Board of Governors from the Fourth Circuit, was born at Charleston, South Carolina, September 30, 1888, the son of Henry Buist and Frances Cualdo Ravenel Buist. His preliminary education was gained in the Charleston schools, and at the Hotchkiss School, at Lakeville, Connecticut, followed by graduation from Yale, with A. B. degree, in 1910. He took law work at the Law Schools of Yale, University of Virginia, and Harvard, and was

admitted to the South Carolina Bar in 1911, prior to completing his legal education.

He has practiced law at Charleston, S. C., as a member of the firm of Buist & Buist, since 1913, with the exception of the war period, during which he served as a Captain of Field Artillery in the Eighth Division.

He is a member of the Charleston County Bar Association, South Carolina Bar Association, American Bar Association, the American Law Institute and the Maritime Law Association.

CARL B. RIX

Carl B. Rix, nominated for Member of the Board of Governors for the Seventh Circuit, was born in Jackson, Wisconsin, September 30, 1878. He studied law at Georgetown University Law School, receiving his LL. B. in 1903 and LL. M. in 1904. He entered the general practice at Milwaukee soon thereafter and has continued in it up to the present time. Since 1908 he has been a member of the faculty of Marquette University Law School, teaching the subjects of Real Property and Future Interests.

He has been especially active in Bar Association work. He is past President of the Milwaukee Bar Association and of the State Bar Association of Wisconsin. In the American Bar Association he has held numerous important positions. He has been a member of the General Council and is at present State Delegate from Wisconsin. He is also member of the Council and Chairman of the Integration Committee of the Section of Bar Association Activities; Member of the Credentials Committee, House of Delegates; Chairman of the Special Committee on Ways and Means.

Mr. Rix is past Vice President of the American Judicature Society and is a member of the American Law Institute. He has delivered addresses to various State and local Bar Associations.

THOMAS J. GUTHRIE

Hon. Thomas J. Guthrie of Des Moines, Iowa, nominated for member of the Board of Governors for the Eighth Circuit, was born in Polk County, Iowa, in 1877. He attended Drake University and received the degree of LL.B. in 1903 from that University. He was admitted to the Iowa bar in the same year and was County Attorney for Polk County from 1909 to 1915. He was appointed District Judge by the Governor in 1916 and was elected in 1918 and resigned in 1920 to enter the firm of Parrish, Guthrie, Colflesh & O'Brien, of which he is now the senior member.

Active in the Iowa State Bar Association, Mr. Guthrie served on that Association's executive committee for seven years and as President in 1934 to 1935. In the American Bar Association since 1921, when he became a member, Mr. Guthrie has served as a member of various committees, and was for four years a member of the State Council for Iowa. He became a member of the General Council in 1935 and has been the State Delegate from Iowa since that office was created.

HENRY S. BALLARD

Henry S. Ballard, nominated for member of Board of Governors for the Sixth Circuit, was born at Coalgrove, Ohio, November 15, 1880, and educated in the public schools of his native village. He taught school for six years, during which time he studied law in an office at Ironton, Ohio, and was admitted to the Bar in 1903. He began the practice of law at Columbus Ohio, where he has since remained. Shortly after his admission to the Bar he became an instructor in the Law School of what is now known as Franklin University, Columbus, Ohio. From 1911 to 1915 he served as Assistant Prosecuting Attorney of Franklin County, and in 1915-1916 was First Assistant Attorney General of the State of Ohio.

Mr. Ballard has been a member of the American Bar Association for twenty years. He served three years as member of the State Council from Ohio, three years as member of the General Council (now State Delegates), from Ohio, and on various committees in the Insurance Law Section.

He is a member of the Columbus, Ohio State and American Bar Associations, the American Law Institute, the American Judicature Society, and the Academy of Political Science. At the present time he is serving as a member of the Committee on Credentials and Admissions of the House of Delegates. His term as State Delegate from Ohio will expire at the conclusion of the Cleveland meeting.

What Has Happened to Federal Jurisprudence?

(*Continued from page 425*)

But even if the legislative history could now be legitimately considered as casting a doubt upon the construction of Section 34, if the question were an original one, it is submitted that it is now difficult to accept a change of construction after 96 years of constant reaffirmance and with complete inaction on the part of Congress which might legislatively have changed the rule at any time it felt so minded.

4. The principle of the instant case (*Erie R. R. Co. v. Tompkins,* decided April 25, 1938) has already been followed by the Supreme Court of the United States in *Ruhlin v. New York Life Ins. Co.,* decided May 2, 1938. That was a suit in equity for recission of an insurance policy, but the sole question was one of construction of the insurance contract, heretofore a question of "general law" and not one of equity jurisprudence. Of the same character is *New York Life Insurance Co., v. Jackson,* decided May 16, 1938. These cases naturally do not rise higher than their source, viz., *Erie R. R. Co. v. Tompkins,* and the same observations apply that are herein made with respect to the parent case.

5. The majority of the court in the instant case (*Erie R. R. Co. v. Tompkins*) says that if it were merely a question of statutory construction, the court would "not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued compels us to do so."

If the foregoing observations of this memorandum have any virtue, it is that the course pursued is plainly constitutional,—if anything, that the declaration by the federal courts of the common law of England according to their best independent judgment, rather than according to local state views of the common law, is a plain mandate of the Constitution, subject only to the regulation of Congress by reason of its control over federal jurisdiction.

If this is so, may we not suppose that the court, on further consideration, if persuaded that the course heretofore so long pursued was plainly constitutional, will carry into execution its declaration that since "only a question of statutory construction" is involved, the court is not prepared to "abandon a doctrine so widely applied throughout a century."

At least, may we not hope that the court, if it

adheres to its present view as to the true meaning of section 34 of the Judiciary Act of 1789, will authoritatively and expressly announce that it adheres to that view solely as a matter of statutory construction of an act of Congress, and not as a matter of constitutional law. Only thus can the area of this momentous change of view be restricted, without unsettling the foundations of the entire federal judicial system with respect to the source of all of the "rules of decision" to be applied in the various classes of cases cognizable therein. Unless this is done, all the known guides, which have been slowly and carefully worked out over a century and a half, must be discarded, and the slow, uncertain, and painful process begun all over again.

American Law Institute's Annual Meeting

(*Continued from page* 430)

agreement over the wording of this proposed Property Act will occur that cannot be reconciled in conference.

The Law of Airflight

"When in December '35 we entered into our arrangement for cooperation in drafting acts with the National Conference of Commissioners on Uniform State Laws we found that the conference had for some time been engaged in drafting acts pertaining to airflight; their committee doing the work in cooperation with a committee of the American Bar Association. The Executive Committee of the conference suggested that we cooperate in this work. This we have done; both organizations appointing William A. Schnader, of Philadelphia, as Reporter, Mr. Schnader having acted as chairman for both the committee of the American Bar Association and the committee of the conference.

"Last year the conference submitted to the Annual Meeting the Law of Airflight Tentative Draft No. 1 which covered the tentative drafts of three acts—Aviation Liability Act; Law of Airflight; Air Jurisdiction Act. At its meeting last February the Council considered with the Reporter a complete revision and several important additions to and changes in the material presented in Tentative Draft No. 1. At the conclusion of its discussion the Council asked its Executive Committee to consider whether these Acts on Airflight as they had been developed by the editorial committee and as amended by the Council should be presented to you for your consideration. On this matter the Executive Committee after full discussion have recommended to the Council that the acts be not further considered by the Institute. In coming to this conclusion the members of the Executive Committee are especially anxious to emphasize that their action is not to be taken as a condemnation of the fundamental principles on which the drafts submitted rest, namely, that a system analogous to workmen's compensation acts should be extended to transportation of passengers by air. It was found that to continue our work on the acts would probably delay the conclusion of the work of the Commissioners on Uniform State Laws on these Acts, work on which, as stated, was begun some time before we signified our willingness to cooperate. Furthermore, as the acts are drawn they present highly controversial questions affecting the growing business of transportation by air, on the correct solution of which we are not especially qualified to pass. The proposed acts, therefore, are in a different class from those on contribution among tortfeasors and property which deal with matters pertaining to the common law and procedure."

A Matter Pertaining to Criminal Justice

The report then sums up the consideration which the institute has heretofore given to the subject of "Criminal Justice," and continues as follows:

"Last fall an interesting study of the administration of criminal justice in New York City as it affects youth over sixteen was published under the title of 'Youth in the Toils.' The little volume is especially interesting, not because it contains many examples of the worse than failure of our existing court procedure and punishment methods—such failures have been often described—but because of its discussion of the fundamental principles which should govern proposals for improvement. A donation of two thousand dollars enabled the Executive Committee of the Council to appoint an advisory committee composed of lawyers and distinguished representatives of other disciplines capable of throwing light upon the problems involved; the committee being requested to suggest work, if any, which the Institute could do in a field much more limited than that dealt with by our former advisory committee. A preliminary report was made to the Council last February. When this report is published, entirely apart from any possible effect on future Institute work, it should arouse very considerable public interest. It is a demonstration of how far education in recent years has made possible agreement among those who have studied the problems of criminal justice from different points of view—legal, social and mental. The committee were unanimous in their recommendations as to the principles which should be adopted if the protection of society, which is the end of criminal justice, is to be effectively promoted.

The Future of the Restatement

"The review of the work done in the past year which I have given you shows that our efforts have been almost exclusively devoted to our work on the Restatement of the Law. The amount of that work falling on the editorial staff has been heavier than in any previous year. Furthermore, we can, I think, truthfully say that the quality of the work being done and the usefulness of the comment accompanying the Sections of the Restatement have steadily improved during the years that have passed since the first editorial conference held in Cambridge in June, 1923. We have learned from experience and we have had much experience.

"We earnestly desire to restate the law of the few additional important subjects to which I have referred at the outset of this report; but whether we do or not, the amount of work to be done is small compared to that which we have accomplished. It may be appropriate, therefore, to say a word as to the future, not of the Institute, but of the Restatement. . . .

Three Lines of Useful Legal Work May Spring from It

"We may, I submit, look forward to a steady increase in the court's recognition of the Restatement.

We may, also, anticipate more than this. The Restatement may be the nucleus from which three lines of useful scholarly legal work will develop. I have referred to two of these in prior annual reports: the translation of the Restatements into foreign languages and the publication in English of a comparison of our law with the law of other countries, especially with their rules of Conflict of Laws. . . .

"The third and even more important type of scholarly legal work which we may find will result from the Restatement is the more intelligent study of what may be termed legal trends and the forces which adjust law and its administration to the needs of life. The Restatement is giving to American and foreign legal scholars a picture of important parts of our law, not as it was, nor as it will be, but as it is. But our common law is not and should not be static. The rule of stare decisis is a rule essential to its existence; but it is also a rule which if overemphasized kills. Those who study our legal past as well as those who seek to discover what the law should be have often found themselves hampered by the absence of agreement as to what the present common law is. The Restatement gives that which we have never had before, a reasonably authoritative expression of the present law. It is not a treatise, it is not a series of monographs discussing important legal decisions, but it is a new starting point from which better treatises and monographs can be written."

Report of Mr. Goodrich, Adviser on Professional Relations

THE report of Mr. Herbert F. Goodrich, the Institute's Advisor on Professional Relations, brought out certain things which he deemed necessary to fill in the picture of the Institute's past year. First, there was the matter of the terminology employed in the Property Restatement. Of criticisms on this score, the report says:

"Some of the reviewers of Property have criticized the terminology employed. Insofar as criticism is directed at a Restatement because it uses a different form of words to express an old idea we should welcome the opportunity to discuss the issue raised by the criticism. It is granted that there is some advantage in keeping familiar terminology where it is active. Mr. Williston's oft quoted dictum at once jumps to mind. He has said 'It is easier to get lawyers to accept a new idea phrased in old terms, than an old idea stated in language with which they are unfamiliar.' But from the very outset one of the things which we have been working for in the Restatement is greater accuracy in our expressions of rules of law. We all know that one of the sources of inaccuracy is the careless use of legal terms. When any part of the Restatement substitutes a new terminology for an old one, the question to be discussed is whether the new language more accurately represents the idea than the terms which it supersedes. The common law has been in process of growth for many hundreds of years; it will probably continue for many more. If the Restatement improves the lawyer's means of expressing his ideas accurately it is a small price to pay that one generation of lawyers must relearn part of its technical vocabulary. Whether the adoption of Professor Hohfeld's terminology in the law of Property is the best method of expresing ideas in that field of the law I do not know. Its use was deliberately adopted after full consideration by the Reporter and his Committee. And they are both competent and experienced. I am sure that they will not wince because some critics prefer other forms of expression. . . .

Restitution and Its Publication

"The volume containing the restatement of Restitution was distributed in November. In it the Institute has done a piece of legal pioneering. As one reviewer has said (Harold H. McLean, in the Detroit Law Review, February, 1938), '"The Law of Restitution" has a strange sound, and "restating it" still more strange. The term "Restitution" does not appear as a subject in the standard digests, and no other treatise is similarly entitled.' Even 'quasi contracts' the unhappy name given to one part of the material dealt with did not become a recognized part of our system of law until Professor Keener's treatise upon the subject was published in 1893.

"Emphasis on the novelty of either name or arrangement, however, will create a misleading impression of this piece of work. As Professor Patterson has said (Mo. L. Rev. 223): 'An examination of its scope and content will reveal that, far from being esoteric, it deals with some rather simple and basic notions of justice, that it has many applications to situations which arise in the ordinary affairs of life, and that its doctrines cut across almost the whole field of private law. Every practicing lawyer, with only a few possible exceptions, will at some time have need for an understanding of the law which this Restatement is desired to expound and clarify.' Here, then, is no synthetic brew prepared by Institute chemists, but rather new bottles for old wine. And the new bottles are not only more beautiful to the eye, but a safer method for preserving legal principle and a more convenient form for rendering it available when needed.

"The subject matter has been before you at several previous meetings. But the presentation has necessarily been piecemeal, as all presentation through successive tentative drafts has to be. Because of that fact and because of the further fact that the general outline of the subject is not as familiar as in such well known divisions as Agency or Contracts, a restatement of the scope of this Restatement may be helpful.

Scope of This Restatement

"1. To get a sense of location of where it belongs in the law, contrast it with the field of Contract and Tort. The theory of Contract is that one should perform his commercial promises and upon failure to do so, the promisee is entitled to be put in the position he would have occupied had the promise been performed. In Tort, one who has been wronged by another is to be put in the position, so far as money can do it, as if the wrong had not been committed. The theory of

Restitution is that (1) one should return a thing (or its value) which he has improperly retained and (2) he should pay for the benefit he has received at another's expense.

"2. Obviously, such theory will, in many instances, cut across both Contract and Tort. What difference will it make whether Restitution law as contrasted with Tort or Contract law is applied? Here there are three points:

"(1) There may be recovery in many cases where there has been no tort or breach of contract.

"(2) The measure of damages may be different under Restitution, frequently larger.

"(3) If the defendant is insolvent, the Restitution claimant may have a preferred claim. In this connection the well known concept of 'Constructive Trust' leaps at once to the mind.

"3. The situations dealt with may be integrated under three main divisions:

"(1) Cases where something has been transferred under a contract and where for some reason, the other contracting party has not performed.

"(2) Cases where a defendant has received something as a result of a tort and where the action is not for the harm that has been done but for the value of what was obtained.

"(3) Cases where there has been no tort, and no breach of contract, but where it is fair that one who has benefited at the expense of another should be required to pay.

"It will be seen from this short summary that the subject which has been christened 'Restitution' is a combination of what has been generally known as quasi contracts, the rights in equity which correspond to the quasi-contractual rights, such as the right to recover back in equity land which has been transferred as the result of fraud or mistake, and the subject of constructive trusts. The reason for adopting the admittedly strange name of Restitution is that it best expresses the subject matter which the Restatement deals with. Again to quote Professor Patterson: '. . . this Restatement may be slow in gaining acceptance by the bench and bar. Yet it has the distinct advantage of sweeping away the accumulations of several centuries of confused and misleading terminology; and the legal problems for which it offers a solution are so common and pervasive, that if it proves to be properly drawn for this purpose, it ought to be widely used. Only time will tell.'" . . .

The "Restatement in the Courts and Legal Periodicals" gives a table showing the number of citations in the courts up to January 1, 1938, and also a list of articles in legal periodicals and law reviews which have dealt with it. In this connection the report says:

"Chief among the matters of interest in connection with the Restatement and the legal magazines is the series which appeared in the American Bar Association Journal aside from the report of our meetings and the like. The Journal has run a series of five articles which deal with developments since the appearance of the Restatement in Agency, Contracts, Conflict of Laws, Torts and Trusts. It is a good series, both from the standpoint of the discussion of the Restatement and from that of the general value of discussion of the growing law."

Code of Criminal Procedure

Under the head of "Code of Criminal Procedure" the report tells of the reception of the product of the Institute's labors as of well as the shorter statutes published under its auspices.

"The Code of Criminal Procedure continues to be the starting point for the work of practically every legislative commission or Bar Association committee engaged in a re-examination of the law on this topic in any state. It is difficult to summarize in simple form legislative adoption. Sometimes a section or a group of sections will be adopted as drafted. Sometimes the Model Code is adopted in part. Sometimes the language is changed, but the provision seems to indicate the influence of the Code, although we cannot, of course, in the absence of definite information be certain. Combining these three types of use of the Code we find it in recent legislation in Arkansas (1937); in California (1935); in Connecticut (1931); in Florida (1937); in Georgia (1935); in Indiana (1937); in Kansas (1937); in Michigan, Minnesota, Montana, Nebraska, New Jersey (all 1935); in New Mexico (1935, 1937); in New York (1935, 1936); in North Dakota, Ohio, Oklahoma (1935); in Oregon and South Carolina (1937); in Virginia (1937); in Wisconsin (1937). The Code as a whole was before the Pennsylvania Legislature in 1937, but did not come to a vote.

"There is evidence of a thorough study and recommendations of many sections by the Florida Bar Association. Some sections have been recommended by the Iowa Bar Association. The New York State Commission on the Administration of Justice has made a thorough study of the Code which is still in progress and much of it has been recommended.

"The shorter statutes have likewise had considerable recognition. A statute providing for Advance Notice of Alibi and Insanity Defense has been adopted in whole or in part in Oklahoma, Oregon and South Dakota. A joint statute providing for Summoning Witnesses to Testify in Another State has been adopted in thirty states as follows: Arizona, Arkansas, California, Connecticut, Delaware, Idaho, Indiana, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wyoming.

"This statute, it will be remembered, is a joint product of the Institute and the National Conference of Commissioners on Uniform State Laws."

Annotations

The progress of "Annotations" in the various states is then set forth and some very helpful suggestions are made.

"Last winter we sent to all members of the Institute and to the members of all of our Cooperating Committees a summary of the annotations work in every state in every subject. It would be an unwise addition to the matter for a May morning to repeat these statistics now. But the following developments since the written report to you are of interest.

"To the list of published Annotations will be added this spring six new volumes. This group comprises California Conflict of Laws, West Virginia Contracts, Minnesota Property, Mississippi Property, South Dakota Torts and Texas Trusts.

"During the winter and early spring, a number of annotators have brought their manuscripts to a point where the end is in sight. Some of them expect to complete their work during the spring or late summer. Those completed before the end of the summer can be included in a group of Annotations to be published next

fall. Among these manuscripts nearing completion are Agency: Colorado, Ohio, New Hampshire, Texas; Conflict of Laws: Alabama; Contracts: Georgia, Maryland; Property: California, Pennsylvania; Trusts: Arkansas, California, Colorado, Minnesota, New Hampshire, Ohio and Rhode Island.

"In a number of states new ground has been broken since last fall. Work was initiated on the California Annotations to Restitution by Prof. O. P. Cockerill, of the University of Southern California Law School. The Indiana Annotations to the Restatement of Restitution have been undertaken by Mr. Corbett McClellan, of Muncie. In Delaware, a fresh and vigorous start on the Annotations' work has been made, with Mr. C. Stewart Lynch, of Wilmington, as annotator. Since Mr. Lynch is interested in the preparation of a Delaware Digest System he has undertaken, with assistants, the preparation of Annotations to Agency, Contracts, Conflict of Laws and Trusts. The Michigan Conflict of Laws Annotations, on which a considerable amount of work had already been done, will be carried on by Mr. Edgar A. Ailes, of Detroit. Minnesota Annotations to Restitution were begun last December by Prof. Edward G. Jennings, of the University of Minnesota Law School. Property Annotations have been started in Missouri by a group of lawyers consisting of Mr. J. Hoffman, Mr. G. S. Roudebush, Mr. L. H. Fisher, Mr. A. J. Bohn, with Mr. Hartley Pollock, Jr., as chairman. The Missouri Annotations to Restitution are being prepared by Dean Joseph A. McClain, of Washington University School of Law, Mr. Philip Alexander, Mr. Walter Berkman and Mr. William Nolan. The preparation of Ohio Annotations to the Restatement of Restitution has been undertaken by Prof. Harry W. Vanneman, of the College of Law of Ohio State University. Work on the Georgia Trusts Annotations has been started by Prof. Henry A. Shinn, of the law school of the University of Georgia. Prof. Raymond C. Baldes, who prepared the Massachusetts Agency Annotations, is supervising the preparation of the Massachusetts Property Annotations which has been undertaken as a WPA project. The preparation of the North Dakota Trusts Annotations is being carried on by Mr. William R. Pearce, of Valley City. In South Carolina, work has been started on Contracts by Mr. Horace Bomar, of Spartansburg. In Utah, Prof. Dwight A. Pomeroy, of the law school of the University of Utah, is preparing the Contracts material.

"In New York, the uncertainty concerning further work on the Torts Annotations by Prof. David S. Edgar, Jr., was removed when his application to have the work continued as a WPA project was approved. A group of lawyers paid with WPA funds have been working under his direction for several months.

"The Institute continues to give aid to annotators in whatever way it can. You will remember that we made what we hoped was a complete list of Trust cases for every state. It is interesting to report that where the list we furnished has been checked by annotators who preferred to depend upon their own search rather than to rely upon ours, they are not finding additional decisions. In other subjects than Trusts we will give such lists as we have and in some cases they are enough for a good start. With Professor Williston's able help, we can give annotator's advice on specific problems prior to the completion of their work. Such advice will often save time and effort on their part.

"An ideal arrangement for excellent annotations work is obviously a well organized Bar Association Committee composed of men from bench, bar and school who are interested in the work for its own sake. To assist in the work of this Committee there should be sufficient money so that it can employ able young men to dig out the material and help arrange it for the larger group to pass upon. We have such Committee arrangement in Pennsylvania and it functions about as perfectly as anything in this human world can function. While its members have spent a good many hours in work on the enterprise I believe they all feel that there has been great satisfaction in the time spent.

"But without having such an ideal working arrangement at their disposal, committees in many other states have done most effective service. Where Bar Associations have not, active individuals have been of immense assistance.

PROPOSED AMENDMENTS TO THE CONSTITUTION AND BY-LAWS OF THE AMERICAN BAR ASSOCIATION TO BE PRESENTED AND ACTED UPON AT ITS SIXTY-FIRST ANNUAL MEETING AT CLEVELAND, OHIO, JULY 25-29, 1938

TO THE MEMBERS OF THE AMERICAN BAR ASSOCIATION:

I

Notice is hereby given that Guy Richards Crump, of Los Angeles, California, a member of the Association and Chairman of the Committee on Rules and Calendar of the House of Delegates, has filed with the Secretary of the Association the following proposed amendments to the Constitution and By-laws of the Association:

Amend Article II of the Constitution as follows:

(1) Strike out the word "and" in next to the last line, and insert a comma in lieu thereof;

(2) Strike out the period after the word "Hawaii," at the end of Article II, and add the following:

"and the Territory of Puerto Rico."

Amend Article V, Section 4, of the Constitution as follows:

Strike out the words "the Territory of Puerto Rico" and the comma immediately following, in lines 3 and 4.

Amend Article V, Section 5 of the Constitution, as follows:

Strike out the sentence beginning in line 43, reading:

"The term of each State Delegate shall begin with the beginning of the annual meeting next following his election and shall end at the beginning of the third annual meeting thereafter."

and insert, in lieu thereof, the following:

"The term of the State Delegates elected in 1938 for one year, two years and three years, respectively, shall begin with the adjournment of the 1938 annual meeting and shall end with the adjournment of the annual meetings in 1939, 1940, and 1941, respectively. The term of each State Delegate elected after 1938 shall begin with the adjournment of the annual meeting following his election and shall end with the adjournment of the third annual meeting thereafter."

Amend Article I, Section 1 of the By-laws as follows:

Strike out the section as it now reads. Insert in lieu thereof the following:

Committee on Admissions; Nomination of Members.—A Committee on Admissions, of five members, shall be ap-

pointed by each State Delegate for his State, for a term of five years, and for such lesser terms as may be necessary to stagger the expiration thereof, on a basis of one expiration each year. Vacancies shall be filled by appointment for unexpired terms. Applications for membership shall be considered by such Committees only upon endorsement thereof by a member of the Association in good standing. Upon the approval of an application by a majority of the Committee on Admissions for the state in which the applicant is engaged in the practice of law or has his principal office, such applicant shall be deemed nominated for membership. The President shall appoint a Committee or Committees on Admissions for the territorial group. This Section shall become operative upon the adjournment of the 1938 annual meeting.

Amend Article X, Section 1, of the By-laws by adding a new paragraph at the end thereof, to read as follows:

The President shall appoint annually for each state and the territorial group a Membership Committee whose duty it shall be to encourage desirable applications for membership. The respective Membership Committees shall be under the supervision of a General Chairman appointed by the President.

II

Notice is also hereby given that Messrs. Eldon R. James, of Cambridge, Mass.; Clarence A. Rolloff, of Montevideo, Minn.; Minier Sargent, of Chicago, Ill.; John H. Scott, of Pittsburgh, Pa.; and John T. Vance, of Washington, D. C., members of the Association and members of the Special Committee to Study and Report Upon the Duplication of Legal Publications, have filed with the Secretary of the Association the following proposed amendments to the By-laws of the Association:

That Section 1 of Article X of said By-laws be amended by adding, after line 26 of said Section 1 of said Article X, as the same appears on page 990 of Volume 61 of the Reports of the American Bar Association, the following:

"On Legal Publications and Law Reporting."

Further that the following new Section, defining the duties of said proposed Committee on Legal Publications and Law Reporting, be added as Section 19 to Article X of said By-laws and that the present Section 19 to 23, inclusive, be renumbered 20 to 24 inclusive:

"Section 19. *Committee on Legal Publications and Law Reporting.* It shall be the duty of the Committee to study and report upon all matters arising in connection with legal publications and law reporting, and to endeavor to eliminate unnecessary duplication, to reduce costs, and to promote improvement in the quality of legal publications and law reporting, and for these purposes to cooperate with state, district and local bar associations and other organizations, to which it may give advice and assistance."

III

Notice is also hereby given that Mr. Harry P. Lawther, of Dallas, Texas, a member of the Association, has filed with the Secretary of the Association the following proposed amendments to the Constitution of the Association:

That Sections 1 and 2 of Article VIII of the Constitution be amended so as hereafter to read as follows:

Article VIII. *Nomination of Officers and Governors.*—Nominations for each of the offices of President, Chairman of the House of Delegates, Secretary and Treasurer and for the Members of the Board of Governors to be elected in that year shall be made from the floor at the annual meeting of the House of Delegates at which said Officers are to be elected.

IV

Notice is also hereby given that Mr. George B. Harris, of Cleveland, Ohio, a member of the Association, has filed with the Secretary of the Association the following proposed amendments to the Constitution of the Association:

That Article VIII of the Constitution be amended by striking out all of Sections 1, 2 and 3 thereof, and substituting in their place, the following:

Section 1. All nominations for the offices of President, Chairman of the House of Delegates, Secretary, Treasurer and members of the Board of Governors shall be by petition as hereinafter set forth. All such petitions shall be filed with the Secretary at the headquarters of the Association not later than ninety days before the opening of the next annual meeting. A member of the Association in good standing may sign a petition for a candidate for each office to be filled at said annual meeting but petitions for each office shall be separate, except that several petition papers for each nomination may be filed as one petition. The consent of the nominee shall be filed with each petition. If no nominations are made by petition, nominations may be made on the floor of the House of Delegates. All elections shall be by the House of Delegates at the close of the first session of its annual meeting. The Secretary shall cause all nominations in whatever manner made to be published in the next issue of the American Bar Association Journal and shall certify such nominations to the House of Delegates. Nominations shall be made only in the manner expressly provided in this Article. All elections, except those where there is no contest, shall be by secret ballot, and a majority of the delegates present and voting shall be necessary to elect.

Section 2. Two hundred members of the Association in good standing, of whom not more than one hundred may be accredited to any one state, may nominate a candidate for President, Chairman of the House of Delegates, Secretary or Treasurer.

Section 3. A member of the Board of Governors shall be elected from each federal judicial circuit, and at the time of his nomination he shall be a member of the House of Delegates and a resident of the circuit for which he is chosen. He shall be elected for a term of three years beginning with the adjournment of the annual meeting at which he is elected and ending with the adjournment of the third annual meeting next following his election. The District of Columbia shall be considered a part of the fourth circuit. All members of the Board of Governors now in office, as well as those elected in 1938, shall serve until the expiration of the terms for which they were elected. Fifty members of the Association in good standing, residents of the federal judicial circuit from which a member of the Board of Governors is to be elected in any year, may nominate a candidate for that office.

HARRY S. KNIGHT,
Secretary, American Bar Association.

Civil Procedure Documents Available

The following documents dealing with the Federal Rules of Civil Procedure are available from the Superintendent of Documents, Government Printing Office, Washington, D. C., at a cost of 15c each:

Federal Rules of Civil Procedure.—House Document No. 460.

Notes to the Rules of Civil Procedure.—House Document No. 588.

Hearings before House Judiciary Committee March 1-4, 1938, on Rules of Civil Procedure and H. R. 8892.—Serial 17.

London Letter

Corporal Punishment

THE Departmental Committee appointed in May, 1937, "to consider the question of corporal punishment in the penal systems of England and Wales and of Scotland; to review the law and practice relating to the use of this method of punishment by Juvenile Courts, by other Courts and as a penalty for certain offences committed by prisoners; and to report what changes are necessary or desirable" issued its Report in March. It is of particular interest in that its publication closely followed sentences of the "cat" passed on two of the four men of good family charged with a particularly brutal and cowardly attack upon a jeweller's representative, whose skull was fractured and who was robbed of valuable rings, which he had been induced to take to an hotel for their approval. The sentences were followed by an excited correspondence in the press on the merits and demerits of such a form of punishment; some holding that it exercised a deterrent influence, while others were of opinion that it was so degrading and destructive of self-respect that it must of necessity enhance any criminal tendencies in the recipient.

Part 1 of the Report contains an historical introduction, together with a summary of the existing law, and it is interesting to note that whipping has been used as a form of punishment from the earliest times. When death was the penalty appointed by the common law for felonies, whipping was one of the punishments so appointed for misdemeanours at common law and for those statutory misdemeanours for which no punishment was specifically provided by statute. The punishment was usually administered in public, either at the cart's tail or at a public whipping post; and women were liable to whipping equally with men until 1820, when the power to order this form of punishment for female offenders was abolished by statute. In earlier days whipping was not only a common occurrence, but the punishment was carried out in a manner so thorough that it would be considered fiendish in these more enlightened times. One instance may be taken by way of illustration from the Middlesex Sessions Records, where it is recorded that, in the year 1613, there was an "Order for Joan Lea to be openly whipped at a cart's tail in St. John Street upon Saturday next until her body be all bloody, forasmuch as she has upon her own petition, exhibited in Court, confessed that she has had a bastard child begotten on her by Thomas Bates."

In the historical introduction referred to the Report deals with the early part of the nineteenth century when the whole of the criminal law was constantly under review, and makes special mention of the seventh report of the Commissioners on the Criminal Law, issued in 1843, in which was expressed the view that whipping "is a punishment which is uncertain in point of severity, which inflicts an ignominous and indelible disgrace on the offender, and tends, we believe, to render him callous, and greatly to obstruct his return to any honest course of life." In the years which followed the whipping of adults was much curtailed, but in 1862 there was an outbreak of robbery with violence in London which led to the passing of the Garrotters Act in 1863, providing that offenders should be "once, twice, or thrice privately whipped." Later statutes have provided the penalty for other offences.

Parts ii, iii and iv of the Report deal with the question of the corporal punishment of young offenders by Courts; corporal punishment by order of Superior Courts; and corporal punishment for offences in Prisons and Borstal Institutions respectively, giving the history and existing law and practice, followed by a summary of the recommendations of the Committee. The repeal of all the existing powers to impose sentences of corporal punishment on persons convicted on indictment is recommended, but the Committee was satisfied that it is essential to hold in reserve, as an ultimate sanction, the power to impose corporal punishment for serious offences against discipline in prisons. They recommend, however, certain modifications of the existing law and practice in this connection. Appendices to the Report include, *inter alia*, statistics from the years 1877 to 1935 of cases of robbery with violence; an analysis of 440 cases of persons convicted of robbery with violence in the years 1921 to 1930; and the law relating to corporal punishment in certain foreign countries, including the United States of America, and British Dominions. The Committee have obviously gone into the subject of their inquiry with particular thoroughness, and there is little doubt that their recommendations reflect the views of the majority of those who have seriously considered the matter without prejudice or sentiment.

Judicial Changes

Lord Hailsham has, for reasons of health, resigned the position of Lord Chancellor and has accepted the office of Lord President of the Council. The duties of his new office are less onerous than those of the Lord Chancellor. He will preside at meetings of the Privy Council and draw up the minutes of council upon subjects which do not belong to any other department of State. The Lord President of the Council is one of the Great Officers of State and, as such, is always a prominent member of the Cabinet. The salary attached to the office is £5,000 per annum.

The new Lord Chancellor is Lord Maugham, a former Lord of Appeal in Ordinary, who was called to the Bar at Lincoln's Inn in 1890, took silk in 1913, and became a bencher of his Inn two years later. In 1928 he was appointed a judge of the High Court, Chancery Division, and in 1934 a Lord Justice of Appeal.

The Hon. Sir Samuel Lowry Porter, a Judge of the King's Bench Division of the High Court of Justice has been appointed a Lord of Appeal in Ordinary to fill the vacancy created by the elevation of Lord Maugham. Mr. Justice Porter was called to the Bar at the Inner Temple in 1905, becoming a King's Counsel twenty years later. He was Recorder of Newcastle-under-Lyme from 1928 to 1932, and of Walsall from 1932 to 1934, in which year he was appointed a Judge.

The vacancy among the King's Bench Judges caused by the appointment of Mr. Justice Porter has been filled by the Hon. Cyril Asquith, the fourth son of the first Earl of Oxford and Asquith. He was born in 1890 and, after a brilliant academic career at Oxford, was called to the Bar at the Inner Temple in 1920, and took silk as recently as 1936. His success at the Bar was not, perhaps, as spectacular as that of many whose legal talents are less obvious. He has been a Reader in law to the Inns of Court for many years and is the Joint author of a notable book on the Outlines of Constitutional Law, now in its fifth edition.

Judicial Reforms

The Administration of Justice (Miscellaneous Provisions) Bill, which has now passed the House of Lords and been sent to the Commons, does not embody any broad principles, but seeks to make minor and useful reforms in the administration of justice. It is based upon the recommendations of the Peel Commission, the Business of the Courts Committee, and an international convention. The Peel Commission suggested that one way to relieve the High Court was to increase the jurisdiction of quarter sessions and that a committee should be set up to consider what extentsion could be granted. This Committee, presided over by Sir Archibald Bodkin, recommended that there could be no extension as quarter session were at present constituted, but that if they were presided over by a qualified lawyer then extended jurisdiction could be entrusted to them. The Bill accordingly enables the King, on the recommendation of the Lord Chancellor, to appoint a legally qualified person as Chairman or deputy chairman of quarter sessions. It extends the jurisdiction of the courts and gives power to pay a salary to the chairman or deputy chairman. The judge going the circuit will have power to cancel assizes where there is no substantial amount of business to be transacted. Another cause of congestion at assizes, and a recommendation of the Peel Commission, is dealt with in the Bill. It is provided that justices are to commit to quarter sessions, and not to assizes, except in unusually grave or difficult cases, or where serious delay or inconvenience would be occasioned by committal to quarter sessions. Six clauses of the bill are devoted to carrying out the recommendations of the Business of the Courts Committee in regard to simplifying the procedure on the Crown side of the King's Bench Division. The Lord Chancellor, in introducing the Bill, stated that this subject was very technical and it was hoped that if these clauses were passed the Crown Office rules could be re-written, simplified, and made part of the general system. Other provisions of the Bill concern the giving effect to international conventions affecting the jurisdiction of English Courts; the power of the High Court to discharge or vary orders for alimony and maintenance; appeals from the Mayor's and City of London Court; and the extension of the jurisdiction of county courts from £100 to £200.

King's Counsel

The list of new King's Counsel which has recently been published contains the names of fifteen members of the Bar as against sixteen in each of the previous three years. Four of them were called to the Bar at the Middle Temple, five at Lincoln's Inn, five at the Inner Temple and one at Gray's Inn.

King's Counsel (or Queen's Counsel) in the modern sense of the term were unknown prior to the seventeenth century. Francis Bacon was the first to be so appointed. It seems that, although Queen Elizabeth was sufficiently favourable to him at the end of the sixteenth century to employ him as one of her learned counsel, it was not until 1604 that King James I appointed him "our counsellor at law or one of our counsellors learned in the law with precedence and preaudience in our Courts or elsewhere." He was to hold office "for as long as he shall bear himself well in the execution thereof . . . by reason of the royal word of Elizabeth or by reason of our warrant under our roval signature." The original patent in Latin is to be found in Rymer's Foedera, xvi. 596. He was also granted a pension of £60 per annum for life. King James conferred the honour on only one other. On September 11th, 1607, Sir Henry Montagu, Recorder of London and later Chief Justice, was granted "the place of one of the King's Majestie's learned councell." For many years such appointments were sparingly made although the rank was more frequently conferred by Charles I. Sir John Finch, William Denny, George Radcliffe and Thomas Levington followed on the Roll. During the Commonwealth there were no such appointments, but they were immediately resumed after the Restoration. Edward Turner, afterwards Speaker of the House of Commons, Solicitor-General and Chief Baron of the Exchequer, and Francis North, later Chief Justice and Lord Keeper, were created King's Counsel, the latter at the age of thirty-one, and of only seven years standing at the Bar. In the reign of James II nine King's Counsel were appointed or reappointed, and eleven in the reign of William III, since when the numbers have increased and decreased by turns. In the current "Law List" there is a total of 293.

King's Counsel were, until comparatively recently, precluded from acting as Counsel against the Crown or the Government without special licence, which licence was, however, never refused. Formerly the cost of the licence was about £9, but it was gradually reduced to the sum of ten shillings and finally abolished altogether in 1886. It was in 1920 that King George V approved the recommendation of the Home Secretary that a general dispensation should be granted to all King's Counsel relieving them from the undertaking entered into on their appointment "to take no wages or fee" for any matter against the King. Licences to plead have not, therefore, been required since that date when a King's Counsel has been instructed on behalf of a defendant against the Crown. King's Counsel are appointed at the instance of the Lord Chancellor, who, however, first submits the names to His Majesty, who signs the warrant for the issue of the patents. With regard to the work "proper to be done by a King's Counsel" with or without a junior, the General Council of the Bar, in 1901, gave it as their opinion that he "should refuse all drafting work, and written opinions on evidence as being appropriate to juniors only, but a King's Counsel is at liberty to settle any such drafting and advise on evidence, in consultation with a junior. In accordance with a long standing rule of the profession he cannot hold a brief for the plaintiff on the hearing of a civil cause in the High Court, Court of Appeal, or the House of Lords, without a junior. It is the usual practice of King's Counsel to insist upon having a junior when appearing for a defendant in like cases, and also when appearing either for the prosecution or for the defence on trials of criminal indictments." The declaration made by a King's Counsel on his appointment is somewhat quaintly worded as follows: "I do declare that well and truly I will serve the King as one of His Counsel learned in the Law and truly counsel the King in His matters, when I shall be called, and duly and truly minister the King's matters and sue the King's process after the course of the Law, and after my cunning For any matter against the King where the King is party save in so far as I may be therein allowed or licensed I will take no wages or fee of any man I will duly in convenient time speed such matters as any person shall have to do in the Law against the King as I may lawfully do, without long delay, tracting or tarrying the Party of his lawful process in that that to me belongeth. I will be attendant to the King's matters when I be called thereto."

The Temple S.

Current Events

(*Continued from page* 415)

islation and Administration of the National Tax Association and has acted as consultant of the Bureau of Research and Statistics of the Social Security Board. Last August and September, he participated in a study of tax problems for the Treasury Department under the direction of Under-Secretary Magill.

Acceleration of Tax Audits

It is the desire of the Secretary of the Treasury that the work of investigation and audit of income tax returns be completed within fifteen months from the last day for filing returns for the several years; and progress has reached the point of expectation that this will be accomplished as to the 1936 and 1937 returns. This would mean completion of the auditing and investigations on the 1937 returns by June 15, 1939.

The Commissioner of Internal Revenue has directed that the field divisions undertake correspondence or office audits in selected cases where the questions involved appear susceptible of discussion without the necessity for an exhaustive investigation. He also has authorized the heads of the thirty-eight revenue agents' divisions located in various cities throughout the country to issue final deficiency notices in all cases where taxpayers fail to make a timely response to the agent's invitation to execute an agreement or to file a protest against proposed deficiencies. The field men are instructed to supply taxpayers with complete information as to the basis of the claimed deficiencies, and to offer them every opportunity to present any evidence or argument they wish against the proposed adjustments.

Reviving Court Issue?

Washington speculative opinion is turning a wondering eye and a slightly grounded ear in the direction of Secretary of Agriculture Wallace in an effort to judge whether he is trying to revive, or to sponsor or promote the revival of, the Supreme Court packing issue in his criticism of the Court's decision in what is commonly spoken of as the Kansas City stockyards case. (Morgan et al. v. United States et al., No. 581). The whole tenor of the Secretary's recently publicized remarks might be considered as of that import; but the particular paragraph of his release which some have thought significant is where he said:

"One year ago a great battle was fought to decide whether the courts could take over the function of determining legislative policy for the nation. That battle was suspended when the courts retreated from the legislative field. This year another battle seems to be opening. An attempt is being made to have the courts invade the administrative field by taking over the rate making and regulatory functions of administrative agencies."

Judicature Society Elects

The American Judicature Society chose Mr. Arthur T. Vanderbilt, who is retiring in July from the office of president of the American Bar Association, as its president for the next year. The Society, at its recent meeting in Washington, also selected one hundred members on its board of directors, a completely new board to hold office for the ensuing year. The purpose of the Society to improve judicial administration seems in a fair way to meet substantial realization, especially so far as concerns elimination of some of the law's delays.

Judge Denman Suggests a Rule

In his talk before the Judicature Society, Judge William Denman, of the Circuit Court of Appeals of the Ninth Circuit, expressed the belief that that court's San Francisco calendar would be truly current by June, and indicated that appeals should not average over six months between docketing and decision, now that the court of which he is a member has been increased to seven members. His opinion was that there seemed to be "no reason why any civil case, to be decided at law or in equity in a single final trial of fact, should remain in any District Court longer than six months from the filing of the first pleading."

Judge Denman concluded that "the law's delays are too often lawyers' delays," although admitting this might be a rather extreme statement. Apparently with the idea of giving the bar something to shoot at, he suggested that each District Court adopt a rule "somewhat as follows":

"There will be called on the first Monday of each month a calendar of the cases not at issue filed two months or more prior thereto. Unless sufficient explanation is made, judgment may be entered against a party at fault for the non-joinder or appropriate fine assessed against him. No continuance will be granted for mere convenience of counsel or upon their mere stipulation. Attorneys seeking continuance shall have their clients in court for the determination, as between client and his counsel, of the cause of the delay of justice. Repeated delays in reaching issue caused by any attorney shall be reported with the delinquent attorney's name in the Federal Reporter."

Tax Exemptions as Rewards

A subcommittee of the Senate Finance Committee has been appointed to investigate systems of sharing profits between employers and employees. This subcommittee consists of Senator Herring, of Iowa, Chairman, Senator Johnson, of Colorado, and Senator Vandenberg, of Michigan.

It has been suggested that federal tax exemptions might be made on dividends paid employees under a voluntary sharing plan. Senator Vandenberg believes that these exemptions might well be the Government's contribution toward establishing a system which would do much toward bringing industrial peace.

Antitrust Prosecutions

The Department of Justice's announcement of the probable outcome in its recent prosecutions of 22 oil companies for violation of the antitrust laws furnishes an illustration of the Department's recently announced policy in respect to cases of this type. The more recent indictment, at Madison, Wisconsin, was entitled United States v. Socony-Vacuum Oil Co., Inc., et al. Fourteen of the defendant companies and 11 of the defendant executives have offered to enter pleas of *nolo contendere* and to pay maximum fines and costs totaling approximately $400,000. This proposal has been accepted by the Department and has been recommended to the court; and if there approved, the Government will dismiss as to the other indicted officials connected with these companies. However, the Department plans to prosecute vigorously the indictment against eight of the companies and their officials who have not offered to plead *nolo contendere*.

The earlier case in the same court, referred to as the "first Madison case," was United States v. Standard Oil Company (Ind.) et al., in which 46 defendants were convicted, but on whom sentences have not as yet been imposed, there now being under consideration motions for new trials. While these two cases were against substantially the same defendants, the charges were different. In the earlier case, it was al-

leged that the major oil companies, by concerted action, were engaged in raising prices and in fixing and maintaining prices, both wholesale and retail, of gasoline throughout the Mid-Western area. In the later case, the one just settled, it was alleged that the companies by concerted action, through a series of unlawful agreements, had fixed and made uniform the maximum margins of gross profits for gasoline jobbers and other practices relating to jobbers; and had prevented a large class of jobbers from enjoying the benefits of free competition, all in violation of the Sherman Act.

Assistant Attorney General Thurman Arnold explained that the Department of Justice should not take the responsibility of declining to present evidence in a criminal prosecution where it has that evidence in its possession, and then continued: "In general, there can be few reasons for failing to present to the court such evidence of criminal action. The existence of acquiescence on the part of the Government over long periods in the past which may make the institution of a criminal prosecution inequitable or its success impossible might be one of those reasons. In these cases, however, there was no acquiescence by governmental authority in the activities complained of."

The Assistant Attorney General's statement continued: "Much confusion, however, has been created by statements that the oil companies were following policies which had received the sanction of government departments under the N.R.A. This is not the fact. The practices for which the defendants in the first oil case were convicted never received government authority under the N.R.A., or otherwise, and the court and jury so found. The same is true of the practices with respect to jobbers for which the defendants were indicted in the present case. Furthermore, these jobber practices began as early as 1931, long prior to the N.R.A., and continued long after the N.R.A. was declared unconstitutional."

Further, in respect to the recently settled case, the statement said: "The case is important because it tends to preserve competition where it still exists. Too often during the past 40 years antitrust proceedings have been brought 10 years too late, when competition has already been destroyed, and it has become impossible to re-create it by a criminal conviction or a court decree. It will, therefore, be the policy of this Department to watch carefully evidences of combinations in industries which are still competitive, in order to avoid the difficulties of breaking up monopolies or combinations in situations where no competing organizations exist to fill the gaps. It is important to announce this policy to clear up the misunderstanding which may arise from the fact that the Department is acting in areas which are admittedly competitive to some extent at the time the proceeding is brought."

News of the Bar Associations

State Bar of Arizona Holds Meeting at Prescott—Judicial Council Recommends Federal Rules of Civil Procedure Be Adopted in State Courts—Committee to Study Amendments to Workmen's Compensation Act, Etc.

THE annual meeting of the State Bar of Arizona was held at Prescott on Friday, April 26, 1938, in the Courtroom of the Superior Court. It was well attended.

One of the principal matters before it was the appointment of a committee to study the Workmen's Compensation Act of the State of Arizona in order to make recommendations for certain amendments to the act, the basic idea being to give the injured employee an appeal to the Superior Court of the county where the injury occurred. The committee is to report its findings to the Board of Governors in November, which gives ample time to prepare such legislation as may be necessary before the meeting of the next State Legislature.

The next matter of importance was a report of the Judicial Council and a recommendation by that body that the new rules of Federal procedure for the District Courts be adopted in Arizona in order to secure conformity in practice between the Superior Courts and the Federal District Courts. At the meeting held at Tucson in April, 1937, a draft of a bill was presented by the Judicial Council, and unanimously approved, for the purpose of authorizing the Supreme Court to adopt rules of procedure to take the place of the present Code of procedure. While this matter carried at Tucson, and the bill will be introduced in the next Legislature, the report of the Judicial Council followed the idea that the Supreme Court, working with the Judicial Council, of which one member of the Court is a member, will adopt that procedure insofar as the same is applicable under the constitution to the State Courts.

Mr. Francis M. Hartman of Tucson was elected President for the ensuing year, Mr. Lawrence L. Howe of Phoenix, Treasurer, and Mr. James E. Nelson of Phoenix, Secretary. Three vacancies on the Board of Governors were filled by the election of C. B. Wilson of Flagstaff to succeed E. R. Byers of Williams, Governor for District No. 1; Edward W. Rice of Globe to succeed Rouland W. Hill of Globe, a member for District No. 3. Mr. Francis M. Hartman and Mr. John C. Haynes, both of Tucson, were re-elected as members of the Board of Governors for District No. 5.

FRANCIS M. HARTMAN
President State Bar of Arizona

A banquet was held in the evening, followed by a ball; both were well attended and highly enjoyed.

JAMES E. NELSON,
Secretary

Florida State Bar Association Instructs Committee to Continue Its Efforts for Unification of Bar by Supreme Court Rules — New Criminal Code to Be Urged—Secretary Bentley Chosen President

ED R. BENTLEY, an attorney of Lakeland, Florida, for nine years Secretary-Treasurer of the Florida State Bar Association and editor of the Florida Law Journal, was unanimously elected president at the 31st annual convention of the Association held in Hollywood on May 5, 6 and 7.

With Bentley on the Executive Council were named George W. Coleman, Palm Beach, Richard H. Hunt, Miami, and Velma Keen, Tallahassee. Harold C. Wahl, chairman of the Junior Section, will also serve on the Executive Council.

The secretaryship of the Association will be filled at an early date.

Mr. Bentley, a native of Texas, has been practicing law in Florida for fifteen years and has been prominent in legal and civic circles. He has been State Commander of the American Legion, District Governor of Rotary, President of the Florida Aviation Association and is at present a director of the Florida State Chamber of Commerce. He will continue to edit the Florida Law Journal.

The Association decided to continue its program to bring about the enactment of the new Criminal Code for Florida on which it has been working for the past six years. It also instructed its committee on Unification of the Bar to continue its efforts to bring about a unification of the Bar by the promulgation of rules by the Supreme Court of Florida which will raise the standards of admission, make it easier to discipline infraction of trust and ethics of the profession, and otherwise create a self-governing Bar.

ED R. BENTLEY
President Florida State Bar Association

The Junior Section, headed by Harold B. Wahl of Jacksonville, with W. P. Simmons, Jr. as secretary, and E. Dixie Beggs, Jr., Pensacola, Hayford O. Enwall, Miami, Henry C. Berg, Jacksonville, Culver Smith, West Palm Beach, Ben Willis, Tallahassee, and Hugh McArthur, Tampa, as Executive Committeemen, has launched a program to reduce the price of law books, particularly the State statutes.

Appearing on the program of the convention was L. B. Nichols, Administrative Assistant of the Federal Bureau of Identification, Washington; Scott M. Loftin, former President of the American Bar Association; Dean R. A. Rasco, University of Miami Law School; Weston Vernon, Jr., chairman Junior Section of the American Bar Association; Chas. Francis Coe, noted writer and recently admitted lawyer of Palm Beach, and W. F. Himes, of Tampa, and Giles Patterson of Jacksonville.

Kentucky State Bar Association's Annual Convention Shows Increased Interest in Its Activities—Notable Addresses Delivered—New Rules for Civil Procedure Discussed—Court Amends Rules for Election of Officers

THE Annual Convention of the Kentucky State Bar Association was held in Louisville, Kentucky, on April 6, 7 and 8, 1938, and was presided over by President Leonard J. Crawford of Newport.

Prior to the opening of the Convention, rules governing the election of officers and commissioners were amended by the Court of Appeals. Under the terms of the amendment President Crawford and the other officers will remain in office until the Saturday following the 1939 Convention.

The opening session was Wednesday evening, April 6, at which time five hundred lawyers and their guests attended a smoker.

The first business session was held on Thursday morning, April 7th, at which time addresses of welcome were delivered by Hon. Joseph A. Scholtz, Mayor of the City of Louisville, and Mr. Edward A. Dodd, President of the Louisville Bar Association. President Crawford then delivered his address, in which he reviewed the many activities that had been launched during the year 1937 and 1938 and reported that the Association's legislative program had been enacted by the 1938 General Assembly of Kentucky. He concluded his address by stating: "The Association and its members each have important responsibilities and obligations and the success of the Kentucky Bar depends upon the mutual fulfillment of these duties."

Judge James W. Stites, Chief Justice of the Court of Appeals, Kentucky's highest court, in the course of his address pointed out the many difficulties that face the Court in the disposition of a large number of cases, and made many valuable suggestions which, if followed, will expedite the determination of appeals by the Court and alleviate to a large extent the problems facing attorneys in the preparation of appeals.

LEONARD J. CRAWFORD
President Kentucky State Bar Association

Judge Simeon S. Willis, former member of the Court of Appeals of Kentucky, delivered an address on the subject of "The Judicial Process In The Evolution of Law." In discussing this subject Judge Willis said:

"The law has been likened to a great pool gathered from the fountains of justice. Every legislative act and every judicial decision raises the level of that pool, and affects the quality and content of the whole; but it is equally true that the new legislation and the latest decisions are themselves affected by the fusion with the existing body of the law. Hence the law, slowly evolved through the ages, is the composite result of many factors and is affected but little by the mere will of the actors. Indeed, as Alexander Hamilton observed, 'the judiciary may be truly said to have neither force nor will, but merely judgment.'"

An address was delivered at the Thursday afternoon session by Judge Christopher J. Heffernan, a member of the Appellate Division of the Supreme Court of New York. He dealt with the subject of the legal profession generally, and made a number of interesting observations. In concluding his address Judge Heffernan said:

"There is a present day demand for lawyers who are superior to the fascination of power or the charms of wealth and who do not employ their talents for self-aggrandizement but devote their energies in favor of the public weal. As lawyers we have a sacred obligation to our profession and to society to consecrate ourselves to the eternal principles of justice enunciated in the constitution of our country and to the protection and preservation of those rights guaranteed to every citizen which the mightiest baron in the land cannot invade and which the humblest citizen may invoke."

Honorable Hubert Meredith, Attorney General of Kentucky, also appeared upon the program and discussed the struggle between capital and labor and the effect of their relations upon the general public. In the course of his remarks he said:

"It has been my purpose to point out the dereliction of our lawmakers in leaving the groups referred to to settle their differences by private warfare; the need for legislation defining the rights and prescribing the remedies of the groups involved; the necessity for clothing the proper tribunals with power and authority to hear and decide disputes between capital and labor and enforce their decrees; and the duty of the legal profession to put forth an effort to have such laws administered and enforced by the courts of the land presided over by trained lawyers, rather than by boards and commissions whose members are without learning and experience in such matters."

Judge L. B. Day, a member of the Supreme Court of Nebraska, spoke on the subject of "What It Means To Be A Lawyer Now." He concluded his

discussion of this topic with the statement:

"The search of the people for a better administration of justice is a glorious adventure in which you are privileged to engage in a large measure. That is what it means to be a lawyer now."

Mr. John W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Appellate District, discussed the new rules for civil procedure in the United States District Courts. He analysed the rules that had been adopted and filed with his address a summary of these rules.

Other speakers upon the business program included Judge Joseph L. Price of the McCracken Circuit Court, Mr. James Milliken, Chairman of the Workmen's Compensation Board of Kentucky, and Mr. D. L. Pendleton of Winchester, Kentucky.

The outstanding social function of the Convention was the annual banquet and dance given on the evening of April 7th. This was attended by more than seven hundred and fifty guests and addresses were delivered by Governor A. B. Chandler of Kentucky and Mr. Alvin Clark of Hopkinsville. Hon. Hatton W. Sumners, Chairman of the House Judiciary Committee of Congress, was scheduled as a speaker on the banquet program, but a last minute development in Washington rendered his attendance impossible. Governor Chandler told of several interesting incidents that he had experienced as a member of the Bar prior to his becoming Governor, and he closed by saying:

"I promise to continue my best efforts to sponsor in any way those things that will advance the Bar in Kentucky and in the Nation, and I am proud to count myself a member in good standing of this fine Association and pledge to you and each one of you loyal, patient, sincere cooperation in undertaking to make the Bar of Kentucky function for the people of the State and the Nation more effectively in the future than it has been able to do in all its glorious past."

This year's Convention was attended by more than seven hundred and fifty members of the Kentucky Bar, and an increased interest in the activities of the Association was reflected by the active participation of these lawyers in various events on the program.

SAMUEL M. ROSENSTEIN,
Secretary

CHARLES V. PORTER
President Louisiana State Bar Association

Louisiana State Bar Association Holds Forty-First Annual Meeting—President Vanderbilt Delivers Address—President Monte M. Lemann Stresses Duty of Lawyers to Support Association—Symposium on Proposed Mineral Code, Etc.

THE Forty-first Annual Meeting of the Louisiana State Bar Association was held in Baton Rouge, April 22 and 23, 1938. More than 400 members were in attendance. The meeting was called to order by Monte M. Lemann, President, of the New Orleans Bar.

Hon. Arthur T. Vanderbilt of the Newark, New Jersey, bar, President of the American Bar Association, was the guest of honor and the principal speaker. His address was made on the morning of the second day of the sessions and was entitled "The Obligation of the Bar in the Administration of Justice." It showed capable care in its preparation, was interesting and instructive, and was received with much appreciation. Mr. Vanderbilt, during his address, took occasion to say, "I cannot fail to be impressed with the remarkable university which you have here in the city. I think many people from my part of the country are utterly unaware of the tremendous progress which has been made here with an institution that must have great influence now and in the future, not only throughout your State but throughout the entire country." The reference was to Louisiana State University, Baton Rouge, where the meeting was held.

Mr. Vanderbilt spoke approvingly of the proposal to found a law institute, put forward in the address of John H. Tucker, Jr., of the Shreveport Bar, and also to the same speaker's explanation regarding the republication of the Projets of the Codes of 1825, saying: "I am particularly delighted with the thought of your translating, and making available in English, one of the comprehensive books on the subject of civil law."

The invocation was pronounced by Reverend Philip P. Werlein of the St. James Episcopal Church, Baton Rouge. Dean Paul M. Hebert, Louisiana State University Law School and attorney, delivered the address of welcome on behalf of the State of Louisiana, substituting for Governor Richard W. Leche, who was unable to be present. Frederick G. Benton of the Baton Rouge bar welcomed the delegates on behalf of the City of Baton Rouge. J. Oliver Bouanchaud, President of the East Baton Rouge Parish Bar Association, welcomed the delegates for the bar of Baton Rouge. John H. McSween of the Alexandria bar responded to the addresses of welcome.

President Lemann delivered his address, during which he particularly expressed his gratification at the remarkable increase in membership in the Association during the past year, amounting to 168 new members. This increase, President Lemann said, "is due to several factors, but chiefly to the fact that the officers of the Association and members of the Executive Committee have held four meetings outside New Orleans during the year, at each of which opportunity was given to address a meeting of local Bar Associations and to become acquainted with members of those Associations."

He then proceeded to give a full account of the activities of the Association during the past year, stressing the various opportunities for service to the public and the profession which such an organization afforded. He made special mention of the proposed amendment to the State Bar Act, designed to render the State Bar a self-governing body, and said: "It is perhaps not too optimistic to expect that there will be no differences of opinion about this bill,

and that it will have the support of leaders of all factions."

Further on in his address President Lemann said: "The administration of justice and the selection of judges continue to be a chief topic of concern everywhere to the lawyers, and only in a somewhat smaller degree to every intelligent citizen. Important experiments are being undertaken in other sections of the country for improvements in the methods of choosing judges. Bar Associations have in this field also a special opportunity for public usefulness, in which they must participate, notwithstanding discouragement and difficulty of accomplishment. While no one can undertake to say that the good opinion of the Bar Associations is a controlling factor in the selection of judges, I think it still remains true that in the conscience and spirit of every judge, the good opinion of organizations of his brother lawyers and a desire to win and retain that good opinion are a constantly operating influence. . ."

He concluded with this appeal to the Bar for support of the Association:

"Upon consideration of what Bar Associations have in fact accomplished, and more particularly of what they might reasonably hope to accomplish by proper, intelligently concerted effort, no lawyer could, I think, justify himself in the conclusion that he has a right to stand apart from Bar Association activities. No lawyer who does stand apart from such activities can fully realize the extent of his personal loss in contact and intimate exchange of views with brother lawyers, free from the controversy and heat of the trial of cases or the presentation of opposing points of view. No lawyer who does so stand apart can fully realize the extent of the satisfaction which he might have gained by participation, no matter how modest, in an organized effort to advance professional standards, to improve the law and thus to serve the community as well as the profession. It is important to do the job worthily, but it is even more important at least to attempt the job. If, as we all hope, the approaching legislative session provides for a truly self-governing, all-inclusive State Bar, the challenge to the lawyers of the State to discharge their professional and public obligations by active participation and leadership in bar association work will be more commanding than ever."

W. W. Young, New Orleans, Secretary-Treasurer, presented his report, showing financial condition of the Association and its membership, in detailed form.

John D. Miller, New Orleans, addressed the Association on "New Rules of Procedure in the District Courts of the United States" and gave a very learned résumé of many of the important phases embodied in this compilation.

John H. Tucker, Jr., Shreveport, delivered an address on the "Republication of the Projets of the Codes of 1825 and the Plan for the Louisiana State Law Institute," which aroused much interest.

Another address of special distinction was that of Hon. Charles A. Holcombe, Baton Rouge, Judge of the 19th Judicial District Court, entitled "The Criminal Code of Louisiana and the Practice of Criminal Law." Judge Holcombe commented on certain articles of the Code of Criminal Procedure of Louisiana, and expressed the opinion "that that ancient institution, known as the Grand Jury, is a useless and unnecessary appendage to our law, and should be abolished. While it does no particular harm, as I see it, it does no good."

A symposium on the Proposed Louisiana Mineral Code was had, which proved very interesting and instructive. A general statement of the Code provisions was made by Sidney L. Herold, Shreveport, a member of the Commission to prepare the Code. Discussion from the standpoint of the Landowners was presented by Dan Debaillon, Lafayette; from the standpoint of the Lessees, by Alden T. Shotwell, Monroe; and from the standpoint of the Royalty Owners, by Allen Barksdale, Ruston.

The officers elected for 1937-38 are: President, Charles Vernon Porter, Baton Rouge; Vice-Presidents—Eugene Stanley, New Orleans, 1st Sup. Ct. Dist.; Pike Hall, Shreveport, 2nd Dist.; Dan Debaillon, Lafayette, 3rd Dist.; Carey J. Ellis, Jr. (Judge), Rayville, 4th Dist.; Francis J. Whitehead, Port Allen, 5th Dist.; Jacob S. Landry, New Iberia, 6th Dist. W. W. Young, New Orleans, Secretary-Treasurer; Stephen A. Mascaro, New Orleans, Librarian & Assistant to the Secretary-Treasurer.

The Executive Committee is composed of the officers above named, with the following five members, appointed by the President, at large: H. Flood Madison, Jr., Monroe; John H. Tucker, Jr., Shreveport; Joseph Merrick Jones, New Orleans; Hermann Moyse, Baton Rouge; Howard B. Gist, Alexandria.

The social features included luncheons for visiting ladies and members of the Association, golf, a dance and banquet.

W. W. YOUNG,
Secretary.

North Carolina Bar Association Holds Fortieth Annual Meeting—President Winslow Speaks on "A Task for the Rule-Making Authority in North Carolina"—Interesting Reports Presented—Attorney General Cummings Speaks Informally

THE fortieth annual meeting of the North Carolina Bar Association was held at the Carolina Hotel, Pinehurst, on May 5, 6 and 7, 1938. A most interesting and constructive program was carried out.

President Frank E. Winslow, of Rocky Mount, presided over the meeting and at the opening session on Thursday night spoke on "A Task for the Rule-Making Authority in North Carolina." An address of welcome was made by J. Talbot Johnson, of the Aberdeen Bar, which was responded to by Miss Lee Smith, of the Albemarle Bar. Following the opening meeting, an entertainment and dance was given by the Moore County Bar.

The Friday morning session was marked by committee reports, an address by Governor Clyde R. Hoey, and the Junior Bar program conducted by T. Spruill Thornton, of Winston-Salem. At the afternoon session, a report of the Committee on Justices of the Peace was made by Chairman Jas. G. W. MacClamroch, of Greensboro. He explained a proposed bill to be presented to the next Legislature improving the system of Justices of the Peace in North Carolina. Among other interesting reports was that of the Committee on Courts and Court Procedure,

KINGSLAND VAN WINKLE
President North Carolina Bar Association

made by Associate Supreme Court Justice W. A. Devin.

At the Friday evening session an address was made by Hon. George Maurice Morris, of Washington, D. C., Chairman of the House of Delegates of the American Bar Association. His subject was "Values for the Bar of North Carolina." Preceding this address, Attorney General Homer S. Cummings spoke informally and interestingly on the work of the Department of Justice especially in stamping out organized crime.

At Saturday morning's session, an address was delivered by Associate Supreme Court Justice M. V. Barnhill on the subject "Some Suggested Reforms in our Judicial System and in Procedural Rules," and a report was made on the Section of Judicial Administration of the American Bar Association by its Chairman, Hon. John J. Parker, Senior U. S. Circuit Judge, of Charlotte.

Officers chosen for the next year were Kingsland Van Winkle, of Asheville, President; J. Burt James, of Greenville, Frank C. Patton, of Morganton, and Miss Lee Smith, of Albemarle, Vice-Presidents; Henry M. London, of Raleigh, Secretary-Treasurer. Messrs. John C. Rodman, Jr., of Washington, and D. Ed Hudgins, of Greensboro, were elected to membership on the Executive Committee. L. J. Poisson, of Wilmington, was elected Chairman of that committee.

A sub-committee consisting of F. E. Winslow, retiring President, Dean M. T. Van Hecke of the University of North Carolina Law School, Dean H. C. Horack, of the Duke Law School, Kingsland Van Winkle and L. J. Poisson was appointed to draft a bill whereby the Supreme Court would make rules for and supervise the operation of all courts inferior to it.

HENRY M. LONDON,
Secretary

Brooklyn Bar's Broadcasts on Legal Subjects

The Brooklyn Bar Association, through its Committee on Public Relations, of which Mr. Richard Mott Cahoone is Chairman, has been sponsoring a series of radio broadcasts over Station WNYC. A number of these broadcasts, previously held, have been electrically transcribed, and the records are now available for the use of other bar associations, according to a letter received from Chairman Cahoone.

Some of the records are upon the following subjects: "Shall lotteries be legalized"; "Trial of a Civil Action"; "Judiciary and the Constitutional Convention"; "The Law is not Static"; "Shall the Civil Courts of New York be Consolidated"; "Crime"; "A Session of the Committee on State Legislation."

Prominent members of the Bench and Bar took part in the broadcasts.